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# A FEDERAL EQUITY SUI

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Professor of Law in the University of Texas,  
Austin, Texas.

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SECOND EDITION

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**DEDICATION**

**IN LOVING MEMORY OF MY BROTHER**

**JUDGE E. J. SIMKINS**



## PREFACE TO SECOND EDITION.

THE generous reception of the first edition of this work, and the fact that the edition is now exhausted, is my only excuse for issuing a second edition.

While I have made few changes in the text of the original work, yet I have sought to improve it in many ways. The text has been expanded where it was deemed necessary to more fully explain the rules of equity practice, and the citations of authority have been brought down to date, giving the names of cases, which were omitted in the first edition.

I have had two purposes in view in enlarging and improving the work: First, to make it a desirable text-book for law schools; and, second, to make it an efficient aid to the practitioner. As to whether I have succeeded must be determined by the profession.

W. S. SIMKINS,  
Professor of Law in the University of Texas.



## PREFACE TO FIRST EDITION.

It is provided by an act of Congress that the practice, pleadings, and forms and modes of proceeding existing at the time in like causes *other than equity*, and admiralty causes in the Circuit and District Courts of the United States, shall conform, as near as may be, to the practice, forms, and modes of proceeding existing at the time in like causes in the courts of record of the State within which such United States Circuit and District Courts are being held, any rule of the court to the contrary notwithstanding. On the law side of the Federal courts, then, it is presumed that the profession in each State would be reasonably familiar with the practice, forms, and modes of proceeding required by this act.

On the equity side, however, the practice, forms, and mode of procedure are governed, first, by acts of Congress; second, by rules promulgated by the Supreme Court in subordination to the acts of Congress; and third, by such local rules as may be promulgated by the Circuit Court of Appeals, and the Circuit and District Courts, in subordination to the acts of Congress and rules promulgated by the Supreme Court.

Whatever may be one's familiarity with the practice on the law side of the Circuit Court of the United States, he can derive very little aid or assistance if called upon to prosecute a suit on the equity side of this court.

It was to meet this condition that I prepared a series of lectures "On a Suit in Equity in the Federal Courts" for the instruction of the Senior Classes in the Law Department of the University of Texas.

I have been induced to publish them in book form, because, I believe, in these lectures may be found a reasonable solution of

any doubt one may have as to any question of practice or procedure in the prosecution of an equity suit in the Federal courts.

I have sought to show, as briefly as possible, not only what should be done, but how to do it; that is, I have not only discussed each step to be taken in a suit in equity, from filing the bill until it reaches the Supreme Court of the United States, but I have indicated forms which may be used in the successive steps to be taken in its progress.

Much that has been written is the result of my personal experience and observation in a practice of many years in the equity courts of the Federal system.

In many instances it has been exceedingly difficult to extract the true rule to be applied, because of conflicting opinions of Federal judges, sometimes based on grounds reasonably calculated to create dissent; while in many other cases conflict has been created by the refusal of the judges to follow the rules, or recognize any limitation to their discretion.

In such cases doubt has been created as to the true rule, and it has tended to emphasize a somewhat prevalent idea that what you may or may not do in a Federal court of equity depends on the condition of the judge's conscience, and not on rule.

However, in every instance when rules have been set aside to reach a conclusion, I have considered the decision as only the law of that particular case, and not as precedent; and, in such cases, I have exercised my best judgment in reaching the correct rule of practice.

In presenting this book to my brethren of the Bar, let it be borne in mind that it has no pretensions to cover the field of Federal practice, except in so far as the jurisdiction of the Federal courts may be involved, but it is sent forth only as a modest guide through the intricacies of a suit in equity in the Federal courts, and any fair criticism that will correct my errors will be sincerely appreciated by

Your obedient servant,

W. S. SIMKINS,

Professor of Law in the University of Texas.





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# A FEDERAL EQUITY SUIT.

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## CHAPTER I.

### THE FEDERAL SYSTEM.

It is not my purpose to discuss the inconvenience and perhaps uselessness of a divided system of law and equity in the administration of justice in the Federal courts. It may be that it is adhering to a practice too vague and shadowy for the eye of common sense to perceive its utility; it may be that such a division has introduced discrepancies, fluctuations, and even anomalies in the whole tenor of our laws; it may be that equity as a supplement to the imperfections of the common law should be blended with it to perfect judicial procedure; it may be that the tenacity with which the Federal system has retained a divided practice, long since abandoned by those from whom we inherited it, is unaccountable and astonishing; and, lastly, it may be that the chasm between law and equity, as administered by the Federal courts, is an unnecessary pitfall to the lawyers in the States having a blended system in practice and procedure, when they seek admission or are removed to the Federal courts; and it may be that if it were in their power they would break this graven image in the Federal temple of justice; yet the fact obstinately faces them, that the condition is a reality, and theorizing on a better method is useless. We have with us a system which recognizes the distinction between law and equity in practice and procedure, and the possibility of a change to  
S. Eq.—1.

conform to our blended system may be in the womb of the future, but no shadow is yet cast telling of the coming event. Taking into consideration this fact, and the vast jurisdiction of the Federal courts, the profession, instead of shrinking from contact with the system, should be pressing forward to master its intricacies.

These courts have original cognizance of all suits of a civil nature, both in law and equity, concurrent with the courts of the State, subject to certain limitations. The limitations as they now exist require that the matter in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States, or treaties made, or to be made; between citizens of different States; between citizens of a State and foreign States' citizens and subjects; and between citizens of the same State claiming land under a grant from a different State.

It will be seen that a Federal court has jurisdiction concurrent with the courts of the State between citizens of a State when a Federal question arises dependent upon a proper construction of the constitution, laws or treaties of the United States; between citizens of a State and citizens of other States; between citizens of a State and aliens in any matter of dispute within the rule of value and amount as above stated. The provision for jurisdiction between citizens of a State claiming land under a grant from a different State has no application in many States.

It will be seen that the field of jurisdiction of these courts, applicable alike to common law and equity, is of vast extent; then consider with it that Texas is only in its swaddling clothes of development, and her possibilities must be developed by foreign capital, whose citizens and subjects would be anxious to escape the local influence connected with our State courts in the event of litigation, and you may catch a glimpse of the trend and extent of the litigation of the future, and into what jurisdiction it will be naturally drawn.

Again, consider the illimitable reach of that Federal octopus commonly known as the 14th Amendment to the Constitution of the United States, which keeps up the flood-tide of Federal litigation, and of which it was said by Mr. Justice Miller, in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, "Though

it has been in the Constitution of the United States but a few years, the docket is crowded with cases in which the court is asked to hold that a State court or a State legislature has deprived someone of property without due process of law."

This distinguished jurist goes on to say that "there seems to be some strange misconception of its scope and power," and he intimates that it is looked upon as a means of bringing into the Federal court, the abstract opinion of every unsuccessful litigant in a State court, and the merits of the State legislation upon which it was founded, for its decision.

This apparent rebuke to the profession has never checked the volume or variety of the questions that seek protection under this particular Federal wing. Out of the cases in which the Amendment has been set up in one form or another, there has been deduced this rule: That the action which may be obnoxious to the 14th Amendment does not mean simply legislative action, but applies to all instrumentalities and agencies officially employed in the execution of the law down to the point where personal and property rights of a citizen are touched, and whether the agencies of the State be executive, legislative, or judicial. *Rogers v. Alabama*, 192 U. S. 231, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Scott v. McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

In addition to this vast field of concurrent jurisdiction, thus briefly alluded to, there is an extensive exclusive jurisdiction which will be referred to hereafter.

### *The System is Fixed by the Constitution.*

But it may be asked, What is the objection to administering this jurisdiction under the blended system familiar to the profession of many of the States? The reply is that the Federal courts cannot adopt the blended system, nor can Congress change the present Federal system, because it is fixed by the Constitution of the United States.

By article 3, section 2, of the Constitution, it is provided

that the judicial power of the United States shall extend to all cases, both in *law* and *equity*, arising, etc. *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655.

The 7th Amendment recognizes again the distinction between law and equity by declaring that in suits at *common law* the right of trial by jury shall be preserved.

The 11th Amendment declares the judicial power shall not be construed to extend to any suit in law and equity prosecuted against the State.

These articles of the Constitution have been construed to be a clear recognition that law and equity should be administered separately in the Federal system.

From the passage of the act creating the Federal system, in 1789, to the last jurisdictional act in 1888, the jurisdiction of the United States courts has been declared to extend to all suits of a civil nature, both in *law* and *equity*, and in the act of September 24, 1789, embodied in U. S. Rev. Stat. sec. 723, U. S. Comp. Stat. 1901, p. 583, it is declared that suits in equity shall not be sustained in the United States courts in any case where a plain, adequate, and complete remedy at law may be had.

In section 913 of U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 683, passed in 1789, and amended in 1792, and known as the process act, it is provided that the forms and mode of procedure in equity shall be according to the rules and usages of courts of equity; and section 917, U. S. Rev. Stat., gives power to the Supreme Court of the United States to prescribe rules of practice in courts of equity.

In construing these various statutes recognizing the distinct nature of these courts and a distinct procedure for each, they have been declared to be but a recognition of the constitutional requirements in organizing the Federal system.

It has been repeatedly stated by the Supreme Court that the Federal legislation could not change it, and that "suits in equity" as designated by the Constitution were suits in which relief was sought in accordance with the principles and practice of equity jurisdiction as established in the High Court of Chancery in England. *Alger v. Anderson*, 92 Fed. 700; *Equity Rule*, 90; *Blackburn v. Selma, M. & M. R. Co.* 3 Fed. 692, 693; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 462, 15 L. ed. 450; *Mississippi Mills v. Cohn*, 150 U. S. 205, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75.

In the early case of *Robinson v. Campbell*, 3 Wheat. 212, 4 L. ed. 372, the question arose whether a mere equitable title could be set up as an answer in ejectment. Justice Todd, in rejecting the defense, says: "The acts of Congress have distinguished between common law and equity, and the courts of the United States must administer remedies, not according to the practice of the State courts, but according to the principles of common law and equity as distinguished and defined in that country from which the knowledge of the principles came."

In *Bennett v. Butterworth* (a Texas case), 11 How. 669, 13 L. ed. 859, Taney, Chief Justice, says: Whatever may be the laws of Texas with reference to pleading and practice, they cannot govern the United States courts to such an extent as would confound the principles of law and equity, or admit the blending of legal and equitable defenses in the same suit. He further declares, "that the Constitution of the United States, creating and defining the judiciary powers of the national government, establishes the distinction between law and equity; and if the suit be an equitable one it must proceed under equitable rules prescribed for the courts of the United States."

Equity jurisdiction, then, is vested, as a part of the judicial power of the Federal government, in separate courts by the Constitution and acts of Congress. (*Fenn v. Holme*, 21 How. 484, 485, 487, 16 L. ed. 199, 200; *Berkey v. Cornell*, 90 Fed. 717; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Noonan v. Lee* (*Noonan v. Braley*) 2 Black, 509, 17 L. ed. 281) and the distinction is recognized as a matter of substance, as well as of form and procedure. *Green v. Mills*, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 857; *Owens v. Heidbreder*, 24 C. C. A. 362, 41 U. S. App. 736, 78 Fed. 837; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; *Gravenberg v. Laws*, 40 C. C. A. 240, 100 Fed. 4; *Berkey v. Cornell*, *supra*. But not only is this true, but the Federal courts have been extremely jealous to guard the equity jurisdiction against limitation or restraint by reason of State legislation creating or limiting remedies. Thus guarded, it is the only court in the United States that maintains uniformity in practice and procedure in all of the States, and in this respect the only national court in the whole judicial system. McManus

v. Chollar, 63 C. C. A. 454, 128 Fed. 902; Pittsburgh C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 21; Louisville & N. R. Co. v. Railroad Commission, 157 Fed. 944; Mississippi Mills v. Cohn, 150 U. S. 204, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75; Payne v. Hook, 7 Wall. 430, 19 L. ed. 261; Smith v. Ft. Scott, H. & W. R. Co. 99 U. S. 401, 25 L. ed. 438.

Equity Rule 90, promulgated pursuant to U. S. Rev. Stat. section 917, U. S. Comp. Stat. 1901, p. 684, provides that in the absence of any rule in the Supreme Court, the practice in equity shall be regulated by the *present practice* of the High Court of Chancery in England. It has been repeatedly declared that the words "present practice" refer to the practice of the High Court of Chancery in 1789. Alger v. Anderson, 92 Fed. 696, 699.

I have thus called attention to a few of the decisions fixing the status of courts of equity in the Federal system. We have with us, then, a court wherein the practice and procedure differs from our State system. It is a court of vast jurisdiction, and eminently progressive in increasing it. It is guarded from limitation or restraint by State legislation, and whether its practice and procedure are unfamiliar or distasteful to the State Bar or not, there can be no change except through a change in the Federal Constitution, of which there is no reasonable hope. So we face a condition imbedded in Federal jurisprudence, which, I regret to say, many State lawyers have not appreciated, but have been disposed to look upon it with sensitive prejudice, and disinclined to approach it with any desire to master its practice or understand its procedure. For some reason the tendency has been to look upon it as a foreign court in our midst; out of harmony with the system familiar to us; and arousing our jealousy as year by year we have watched it plume its wings for bolder flights of jurisdiction. This should not be; this court is a part of the judicial system, and as much an instrument of remedial justice in every State as the State courts, and we should so recognize it, and, rather than ignore or resist, should equip ourselves to intelligently direct its great powers within the limitations of the Constitution.

Our State Constitutions declare "the Constitution and laws of the United States to be the supreme law of the land," and to

preserve that supremacy it became necessary to provide a judicial system, and vest in it a jurisdiction that could best effect this purpose. Const. of U. S. art. 6, cl. 2, also declares this supremacy. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 171; *Whitten v. Tomlinson*, 160 U. S. 238, 40 L. ed. 410, 16 Sup. Ct. Rep. 297; *Osborn v. Bank of United States*, 9 Wheat. 818, 6 L. ed. 223.

The wisdom of our fathers created the system, great judges have given to it shape and form, and though, viewed from its modern surroundings, there appears quaintness and want of harmony with our ideas, yet it is none the less efficient in securing justice, for which alone we should strive.

I will remark in passing that our blended system of administering law and equity has not escaped criticism, and I will briefly refer to some expressions of the Supreme Court of the United States in which its efficiency has been doubted.

Several of the early cases in which the Supreme Court of the United States was called upon to define the separate jurisdictions of law and equity, went up from Texas, as it was somewhat of a pioneer in this blended procedure. In *Green v. Custard*, 23 How. 484, 16 L. ed. 471, the court said: "Because the case originated in the courts of Texas the counsel were permitted to turn it into a written wrangle, instead of requiring them to plead as lawyers in a court of law." The court further said it had occasion to notice before the consequences resulting from this hybrid system of pleading being permitted in the administration of justice in that State. The reference was to *Randon v. Toby*, 11 How. 493, 13 L. ed. 784, and *McFaul v. Ramsey*, 20 How. 523, 15 L. ed. 1010. Concluding, the court says: "The case at bar adds another example of utter perplexity and confusion of mind introduced into the administration of justice by practice under such methods." In *Jones v. McMasters*, 20 How. 8, 15 L. ed. 805, the court said that many of the cases at law coming up from that State are greatly embarrassed from the want of observance of the distinction between law and equity. I allude to these cases, not only to show that there is not an universal appreciation of our blended system, but to show the spirit of our ancestors during the formation period of the Federal system, and why they have handed down to us the divided system of practice and procedure.

In these observations of the Federal system I have not touched upon the volume of litigation that flows into the Federal courts through the removal acts of Congress. You must here also face the fact that large property interests of your clients are liable to be removed from the State courts into the Federal courts, and to be disposed of under Federal methods of procedure. When so removed, it must fall on the law or equity side of the court, according to the nature and essential character of the case made in the State court. *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 138, 18 L. ed. 767; *Van Norden v. Morton*, 99 U. S. 380, 25 L. ed. 454.

How necessary it is to be ready for the emergency, that is,—

First. To know upon which side of the court you must go.

Second. To know how to recast your pleadings, if necessary, in order to proceed with the litigation.

It is not honest to the public, whose business you invite, to wait until the emergency arises before you begin to prepare for it; and when your client has lost his case or has been mulcted in costs, because of your want of preparation, it will not do to console yourself with the reflection that it was a necessary sacrifice to untutored genius in its forced effort to grasp the Federal practice.



## CHAPTER II.

### MAXIMS.

As to what are matters of equitable cognizance, such as equitable titles, rights, and interests, it is not intended to discuss in these lectures, further than to illustrate the practice and procedure in the conduct of a suit in equity in the Federal courts. The distinctive principles upon which general equity jurisdiction rests, and the nature, character, and extent of the jurisdiction, has already been discussed in my lectures on Equity Jurisprudence. I have endeavored to state there the rules by which you are to test the facts in hand, and by which you may conclude with reasonable certainty whether your cause of action be of equitable cognizance or not.

I am now attempting only a modest guide through the apparent intricacies of a suit in equity in a Federal court, and therefore I shall principally speak of the practice and proceedings which regulate this character of suit, from the filing of the bill to the final decree; that is, I take up the procedure after you have determined that your cause of action is an equitable one, and proceed with it to a final decree in the courts of last resort. Before entering into the successive steps to be taken in a suit on the equity side of the Federal court, it is necessary to refresh your memories as to certain conditions that must exist to give you any standing in a court of equity, even though your cause of action be an equitable one, and in this connection to especially call your attention to section 723 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 583), which embodies in mandatory form an ancient rule of equity jurisdiction.

The conditions referred to are contained in the maxims of equity, which I will here restate:

First. You must come into equity with clean hands. *Knapp v. S. Jarvis Adams Co.* 70 C. C. A. 536, 135 Fed. 1008, 1015;

*Camors-McConnell Co. v. McConnell*, 140 Fed. 412, 72 C. C. A. 681, 140 Fed. 987; *Edward Thompson Co. v. American Law Book Co.* 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Creath v. Sims*, 5 How. 204, 12 L. ed. 117.

Second. In asking equity you must have done or prepared to do equity. *Stewart v. Wright*, 77 C. C. A. 499, 147 Fed. 346; *Brown, B. & Co. v. Lake Superior Iron Co.* 134 U. S. 535, 33 L. ed. 1024, 10 Sup. Ct. Rep. 604; *McQuiddy v. Ware*, 20 Wall. 14, 22 L. ed. 311; *Hager v. Thomson*, 1 Black, 94, 17 L. ed. 45; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Willard v. Tayloe*, 8 Wall. 569, 19 L. ed. 504; *Duff v. Hopkins*, 33 Fed. 609; *Neblett v. MacFarland*, 92 U. S. 101, 23 L. ed. 471.

Third. Equity considers that done which ought to have been done, and that left undone which ought not to have been done. *Taylor v. Longworth*, 14 Pet. 172, 10 L. ed. 405; *Warner v. New Orleans*, 31 C. C. A. 238, 59 U. S. App. 131, 87 Fed. 829; *Morris v. United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649; *Moore v. Crawford*, 130 U. S. 128, 32 L. ed. 880, 9 Sup. Ct. Rep. 447; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779.

Fourth. Equality is equity. *United States Rubber Co. v. American Oak Leather Co.* 181 U. S. 434, 45 L. ed. 938, 21 Sup. Ct. Rep. 670; *Glover v. Patten*, 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411.

Fifth. When equities are equal the first in time prevails. *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388; *FitzSimmons v. Ogden*, 7 Cranch, 2, 3 L. ed. 249; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571; *Neslin v. Wells, F. & Co.* 104 U. S. 428, 26 L. ed. 802.

Sixth. When equities are equal the law prevails. *Townsend v. Little*, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; *Simmons v. Ogle*, 105 U. S. 278, 26 L. ed. 1090.

Seventh. Equity aids the vigilant, not those who slumber upon their rights. *New York v. Pine*, 185 U. S. 98, 46 L. ed. 823, 22 Sup. Ct. Rep. 592; *Galliher v. Cadwell*, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Wetzel v. Minnesota R. Transfer Co.* 12 C. C. A. 490, 27 U. S. App. 594, 65

Fed. 26; *Citizen's Sav. & T. Co. v. Belleville & S. I. R. Co.* 84 C. C. A. 577, 157 Fed. 73.

Eighth. Equity follows the law. *Aldrich v. Campbell*, 38 C. C. A. 347, 97 Fed. 669; *Magniac v. Thompson*, 15 How. 281, 14 L. ed. 696; *Rees v. Watertown*, 19 Wall. 107, 22 L. ed. 72; *Gamewell Fire-Alarm Teleg. Co. v. Laporte*, 42 C. C. A. 405, 102 Fed. 420.

Ninth. Equity finds a remedy for every wrong. *Southern California v. Rutherford*, 62 Fed. 797; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania*, 19 L.R.A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 741.

The application of these maxims were illustrated in my equity lectures by both Federal and State authority, and it was made apparent that a clear comprehension of their meaning was necessary in solving any doubts as to the proper remedy. So, without further observation on these maxims, I will proceed at once to the discussion of section 723 of the Revised Statutes of the United States.

### *Section 723.*

This statute is one of the principal tests of jurisdiction in equity, that is, it is axiomatic in its nature, and universal in its application, and is in these words: "Suits in equity shall not be sustained in either of the courts of the United States [circuit and district] in any case where a plain, adequate, and complete remedy may be had at law." This act is held to control procedure in Federal courts. *Jones v. Mutual Fidelity Co.* 123 Fed. 506; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767.

This rule is the test of equitable jurisdiction. *Ibid.*; *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 207, 215-216, 26 L. ed. 981, 984; *Hartford F. Ins. Co. v. Bonner Mercantile Co.* 11 L.R.A. 623, 44 Fed. 155; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 302.

The rule is as old as the recorded history of chancery courts of England. *Payne v. Kansas & A. Valley R. Co.* 46 Fed. 552; *Lewis v. Cocks*, 23 Wall. 470, 23 L. ed. 71, from whence the Federal system was derived. See Equity rule 90; *Pennsylvania v. Wheeling & B. Bridge Co.* 18 How. 462, 15 L. ed.

450; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742. It grew out of the failure of the common law to meet new social conditions, and the refusal of the common-law courts to apply remedies to wrongs arising out of the complex rights and duties of an advancing civilization. As said by Mr. Pomeroy: "The common-law courts were closed against a large and ever increasing class of rights and remedies, and a distinct tribunal, with a broader and more flexible jurisdiction and mode of procedure, became absolutely necessary, or else justice had to be denied." Pom. Eq. Jur. 3d ed. § 23. Whatever may have been its origin, it came to us with the system of equity practice of the High Court of Chancery which this country adopted, as shown by Equity Rule 90. *Boyle v. Zacharie*, 6 Pet. 658, 8 L. ed. 536; *Lewis v. Shainwald*, 48 Fed. 493; as to the force of rule 90, *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261.

It may be asked, then, why did Congress emphasize the rule by embodying it in an act, and in the particular mandatory form in which it appears, as, "*Suits in equity shall not,*" etc.? The language was intended to impress upon the Federal judges that the rule should be construed in the light of the 7th Amendment to the Constitution of the United States, guarantying trial by jury in all matters not clearly of equitable cognizance. This Amendment was contemporaneous with the passage of the act embodying section 723; that is, the Amendment was proposed five days after the passage of the act. *Alger v. Anderson*, 92 Fed. 700; *Parsons v. Bedford*, 3 Pet. 446, 7 L. ed. 736; *Grether v. Wright*, *supra*; *Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 838; *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Wehrman v. Conklin*, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129.

Trial by jury in civil as well as criminal cases was among the privileges our ancestors most cherished, and it found expression in this 7th Amendment to the Federal Constitution in the following words: "In all suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The mandatory form of section 723 was intended to breathe somewhat the spirit of this Amendment, and require a liberal construction in behalf of the

right to have issues of fact determined by a jury, instead of by a chancellor (*Whitehead v. Shattuck*, 138 U. S. 150, 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Scott v. Neely*, 140 U. S. 109, 35 L. ed. 359, 11 Sup. Ct. Rep. 712; *Strang v. Richmond, P. & C. R. Co.* 93 Fed. 74, 75), because every case construed to be within the jurisdiction of equity virtually withdrew the issues from trial by a jury, as in cases in chancery both fact and law were determined by a chancellor. U. S. Rev. Stat. 648, U. S. Comp. Stat. 1901, p. 525.

True, a chancellor may send issues of fact to a jury at his pleasure, but the finding is only advisory, or for his information, which he may regard or not, for he is in no way bound by it. *Flippen v. Kimball*, 31 C. C. A. 282, 59 U. S. App. 1, 87 Fed. 258; *Oil Well Supply Co. v. Hall*, 63 C. C. A. 343, 128 Fed. 878; *Wilson v. Riddle*, 123 U. S. 615, 31 L. ed. 283, 8 Sup. Ct. Rep. 255; *Perego v. Dodge*, 163 U. S. 165, 41 L. ed. 117, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298; *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 496.

By act of 1875 (1 U. S. Rev. Stat. Supp. 1874-1881, p. 136, § 2) it is specially provided that courts of equity in patent causes may impanel a jury of from five to twelve men to examine issues of fact, but the verdict has no greater force than as stated above.

Again, the power of the chancellor in England, through equitable processes and inventions, was ever an expanding one, and tending to suppress jury trials, and it was reasonable to suppose that this object lesson inspired the mandatory form of the Federal statute, and was an effort to restrict this ancient jurisdiction. That this spirit, or purpose, of our forefathers has imbued either the minds or hearts of our Federal judges in perfecting the Federal equity system which now overshadows the jurisprudence of these United States, has at least been doubted by one of the great political parties of this country, if we may judge from its battle cry of "down with government by injunction."

The Federal courts were called upon to construe this section 723 at a very early period, and we find in *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655, Mr. Justice Johnson saying, "that

since its passage in 1789 the court has been often called upon to construe this article, and has as often held it '*declaratory only*,' making no alteration whatever in the rules of equity on the subject of legal remedies." Mr. Justice Story, in *Bean v. Smith*, 2 Mason, 270, Fed. Cas. No. 1,174, says: "Section 723 is in no sense intended to narrow the jurisdiction of courts of equity as to proper subjects of relief in the courts of equity in England, the reservoir of our system." *Alger v. Anderson*, 92 Fed. 696, 697. Sixty years after the Supreme Court in *Wehrman v. Conklin*, *supra*, says "that section 723 has never been regarded as restricting the ancient jurisdiction of courts of equity or to prohibit their exercise of concurrent jurisdiction with courts of law, where such jurisdiction has been previously upheld." Thus we see that the Supreme Court has adhered to the construction that this section was only "declaratory," and that its mandatory form was only intended to impress the ancient rule, but not thereby to restrict the ancient jurisdiction of the courts of equity as exercised by the chancery courts of England. *Salton Sea Cases*, 97 C. C. A. 214, 172 Fed. 792; *Grether v. Wright*, *supra*; *Pittsburgh, C. & St. L. R. Co. v. Keokuk, & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 20; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55.

With this general view of section 723 I will now proceed to discuss its principal features and how it is to be set up as a defensive pleading. I will divide the discussion into four heads, as follows:

First. Construction of the words "remedy at law."

Second. Construction of the words "plain, adequate, and complete."

Third. When it must be set up to be effective as a defense.

Fourth. When a court of equity will act, though not set up as a defense.

## CHAPTER III.

### "REMEDY AT LAW."

These words refer to the common law, and not the statute law of a State, and it has been uniformly held to have reference to the common law as it existed in 1789, when the section was passed. *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55, 56; *McConihay v. Wright*, 121 U. S. 206, 30 L. ed. 933, 7 Sup. Ct. Rep. 940; *Green v. Turner*, 98 Fed. 756; *H. B. Claflin Co. v. Furtick*, 119 Fed. 433; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Jones v. Mutual Fidelity Co.* 123 Fed. 507, 520.

Thus in *Robinson v. Campbell*, 3 Wheat. 212, 4 L. ed. 372, it is said that the "remedy at law," used in the statute, meant remedies known to the common law when the act was passed in 1789 (*Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 20, 21; *Alger v. Anderson*, 92 Fed. 697; *McConihay v. Wright*, *supra*), such as, ejectment, debt, covenant, detinue, assumpsit, replevin, and trespass.

The Federal courts have refused to recognize any change made by the statutes of the various States in these remedies when testing their jurisdiction under this act. *Van Norden v. Morton*, 99 U. S. 378, 25 L. ed. 453; *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; *Alderson v. Dole*, 20 C. C. A. 280, 33 U. S. App. 460, 74 Fed. 30; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Empire Circuit Co. v. Sullivan*, 169 Fed. 1009; *Smyth v. Ames*, 169 U. S. 516, 42 L. ed. 838, 18 Sup. Ct. Rep. 418.

The rule may be stated as follows: If according to the common law in 1789 a right was legal, no subsequent declaration of a State statute, declaring it equitable, could give jurisdiction to the equity courts of the Federal system, and if the

right was equitable, no State law declaring it a legal right would deprive the Federal equity courts of jurisdiction. *Alger v. Anderson*, 92 Fed. 697; *Whitehead v. Entwistle*, 27 Fed. 781; *Mississippi Mills v. Cohn*, 150 U. S. 204, 205, 37 L. ed. 1053, 1054, 14 Sup. Ct. Rep. 75.

To illustrate the rule: A located land certificate in Texas has been declared by the State supreme court a legal right (*Adams v. House*, 61 Tex. 639; *Dupree v. Frank* [Tex. Civ. App.] 39 S. W. 994); yet if an action is brought on that certificate in the Federal courts to try title, you must sue on the equity side. If the legislature had declared that the certificate was a legal right, it would not give jurisdiction to a Federal court of law, nor deprive its equity courts of jurisdiction, because the essential nature of a certificate for land is only an equitable right, which legislation cannot change, unless it be an act of Congress. *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Schoolfield v. Rhodes*, 82 Fed. 153; *Scott v. Neely*, 140 U. S. 110, 111, 35 L. ed. 360, 361, 11 Sup. Ct. Rep. 712; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Fenn v. Holme*, 21 How. 484-487, 16 L. ed. 199, 200.

Again, the rule is thoroughly settled that to oust the jurisdiction of a court of equity the remedy at law must be such as is known to the Federal courts, and it must be a remedy at law in the Federal courts (*Coler v. Stanley County*, 89 Fed. 260; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761-765; *Scott v. Neely*, 140 U. S. 111, 35 L. ed. 360, 11 Sup. Ct. Rep. 712; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418), that is, a remedy existing in 1789, and known to the common law. We have, then, the remedies in Federal courts at common law or equity, "according to the essential character of the case," and to be determined in the light of the jurisdiction of the High Court of Chancery and common-law courts of England in 1789, the date of the judiciary act. *Green v. Turner*, 98 Fed. 756; *Van Norden v. Morton*, 99 U. S. 380, 25 L. ed. 454; *New Orleans v. Louisiana Constr. Co.* 129 U. S. 46, 32 L. ed. 607, 9 Sup. Ct. Rep. 223; *Lindsay v. First Nat. Bank*, 156 U. S. 485, 39 L. ed. 505, 15 Sup. Ct. Rep. 472; *Peck v. Ayers & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 275.



You will see upon examination of the judiciary act of 1789, of which section 723 is a part, it is provided that the laws of the States shall be rules of decision in the Federal courts, but it was early decided that it had no reference to proceedings in equity. *Rev. Stat. sec. 721*; *Bucher v. Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 81-84; *Johnston v. Roe*, 1 McCrary, 162, 1 Fed. 695; *Robinson v. Campbell*, 3 Wheat. 223, 4 L. ed. 376; *Pennsylvania R. Co. v. Allegheny Valley R. Co.* 25 Fed. 115; *Peck v. Ayres & L. Tie Co.* 53 C. C. A. 551, 116 Fed. 273; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 138, 30 L. ed. 572, 7 Sup. Ct. Rep. 430; *White v. Bowser*, 48 Fed. 188; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 15 C. C. A. 184, 46 U. S. App. 530, 68 Fed. 21.

It has been thoroughly settled that the jurisdiction of courts of equity cannot be limited or enlarged by State legislation, nor its general powers affected by such legislation. *McConihay v. Wright*, 121 U. S. 206, 30 L. ed. 933, 7 Sup. Ct. Rep. 941; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 764; *Mississippi Mills v. Cohn*, 150 U. S. 205, 37 L. ed. 1053, 14 Sup. Ct. Rep. 75; *Jones v. Mutual Fidelity Co.* 123 Fed. 507; *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 379; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Orendorf v. Budlong*, 12 Fed. 26; *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 520, 22 L. ed. 605; *Whitehead v. Shattuck*, 138 U. S. 152, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

While State statutes cannot control the jurisdiction of equity courts in any way by declaring what is a legal or an equitable cause of action, yet it must not be understood that the Federal courts of equity will not enforce new rights and remedies or new remedies for old rights created by State legislation, after it has acquired jurisdiction based upon its own independent grounds of determining it. A Federal equity court has an exceedingly wide discretion in applying remedies, and does not hesitate to enforce new rights or remedies provided by State statutes, if they are substantially consistent with the ordinary modes of chancery proceeding and practice. *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 S. Eq.—2.

Fed. 399, 5 A. & E. Ann. Cas. 314; *Humes v. Little Rock*, 138 Fed. 929; *United States Shipbuilding Co. v. Conklin*, 60 C. C. A. 680, 126 Fed. 135; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Jones v. Mutual Fidelity Co.* 123 Fed. 519; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936; *Land Title & T. Co. v. Asphalt Co.* 62 C. C. A. 23, 127 Fed. 2; *Southern Pine Co. v. Hall*, 44 C. C. A. 363, 105 Fed. 84; *Massachusetts Ben. Life Asso. v. Lohmiller*, 20 C. C. A. 274, 46 U. S. App. 103, 74 Fed. 23.

It has been frequently declared that "a party, by going into the national courts, does not lose any right or appropriate remedy of which he might have availed himself in the State courts in the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453; *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 227; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Cowley v. Northern P. R. Co.* 159 U. S. 582, 40 L. ed. 266, 16 Sup. Ct. Rep. 127. To illustrate: A State law may declare what fact or act is a cloud upon title, and a Federal court of equity will remove it. On the other hand, if the remedy or proceeding authorized by the State court is not consistent with the ordinary modes of equitable proceeding, the Federal court will not enforce it. Thus a State statute authorizing a simple contract creditor to set aside a conveyance made in fraud of creditors will not be enforced in the Federal courts of equity, as, according to the principles of equity, the plaintiff must first reduce his debt to judgment before he can attack a fraudulent conveyance. In a word, the defendant is entitled to a jury to determine the existence of the debt, before it can be made the basis of an equitable proceeding. *Cates v. Allen*, 149 U. S. 451-456, 37 L. ed. 804-807, 13 Sup. Ct. Rep. 883, 977; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. 782; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 379, 37 L. ed. 115, 14 Sup. Ct. Rep. 127; *Hook v. Ayers*, 12 C. C. A. 564, 24 U. S. App. 487, 64 Fed. 661; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 511.

*Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123, was one of the earliest cases recognizing equitable rights created by State laws, and presents a case where the laws of Kentucky enlarging the remedy for quieting title by one in possession was enforced by the Federal court; and since that time many cases have followed, enforcing new rights and remedies provided by State laws. *Holland v. Challen*, 110 U. S. 21, 28 L. ed. 54, 3 Sup. Ct. Rep. 495; *Greeley v. Lowe*, 155 U. S. 58-75, 39 L. ed. 69-75, 15 Sup. Ct. Rep. 24; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 746; *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 164; *Bardon v. Land & River Improv. Co.* 157 U. S. 330, 39 L. ed. 720, 15 Sup. Ct. Rep. 650; *Darragh v. H. Wetter Mfg. Co.* 23 C. C. A. 609, 49 U. S. App. 1, 78 Fed. 14; *Missouri, K. & T. Trust Co. v. Krumseig*, 172 U. S. 361, 43 L. ed. 477, 19 Sup. Ct. Rep. 179; *Lilienthal v. Drucklieb*, 80 Fed. 563; *Cowley v. Northern P. R. Co.* 159 U. S. 582, 40 L. ed. 266, 16 Sup. Ct. Rep. 127; *Reynolds v. Crawfordsville*, 112 U. S. 410, 411, 28 L. ed. 735, 736, 5 Sup. Ct. Rep. 213; *Chapman v. Brewer*, 114 U. S. 170, 171, 29 L. ed. 87, 88, 5 Sup. Ct. Rep. 799. But to do this certain conditions must exist, to wit, the new right and remedy given by statute must not involve in its enforcement the blending of legal and equitable remedies, nor should the new equitable remedy infringe on the right of trial by jury. *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Hurt v. Hollingsworth*, 100 U. S. 103, 25 L. ed. 570; *Scott v. Armstrong*, 146 U. S. 512, 36 L. ed. 1063, 13 Sup. Ct. Rep. 148; *Greeley v. Lowe*, 155 U. S. 75, 39 L. ed. 75, 15 Sup. Ct. Rep. 24; *Wehrman v. Conklin*, 155 U. S. 323, 39 L. ed. 172, 15 Sup. Ct. Rep. 129; *Scott v. Neeley*, 140 U. S. 110, 35 L. ed. 360, 11 Sup. Ct. Rep. 712; *Cates v. Allen*, 149 U. S. 456, 37 L. ed. 807, 13 Sup. Ct. Rep. 883, 977.

A statute of a State declaring a right that would exist without the statute will be enforced by the Federal courts at law or in equity as it may fall. *First Nat. Bank v. Peavey*, 69 Fed. 457, and authorities cited.

### *Federal Common Law.*

It may be asked, in determining this remedy at law, if there

is no Federal common law as distinct from the common law of England and as it exists in the States. It is said in *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 101, 45 L. ed. 770, 21 Sup. Ct. Rep. 561, that there is no body of Federal common law separate and distinct from the common law existing in the several States. *Wheaton v. Peters*, 8 Pet. 658, 659, 8 L. ed. 1079, 1080; *Smith v. Alabama*, 124 U. S. 478, 31 L. ed. 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *United States v. Wong Kim Ark*, 169 U. S. 655, 42 L. ed. 893, 18 Sup. Ct. Rep. 456; *Pennsylvania v. Wheeling B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

In *Murray v. Chicago & N. W. R. Co.* 62 Fed. 24, Judge Shiras, in an elaborate discussion of the conditions under which the common law of England was adopted and modified to suit the surroundings of the Colonies, says that the adoption of the Constitution and the creation of our national government with its co-ordinate branches did not abrogate the common law or deprive the people of its benefits, and the Federal courts are called upon to apply its rules whenever the particular case requires it, where there is no statute or other obligatory rule of decision. *Western U. Teleg. Co. v. Call Pub. Co.* 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. See *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 859.

While it is said that the United States has no "common law" distinct from the common law of England as adopted by the several States, yet in the light of the various decisions of the Federal courts, it seems the statement can be challenged. These courts have created a body of "general law," notably in interstate commercial transactions; liability of railroads to servants; the "lex mercatoria" etc.; and in matters of concurrent jurisdiction they have not hesitated to administer the law independent of the decisions of State courts in many instances. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 370, 37 L. ed. 773, 13 Sup. Ct. Rep. 914; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana)* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Swift v. Philadelphia & R. R. Co.* 5 Inters. Com. Rep. 116, 64 Fed. 65; *Ells v. St. Louis, K. & N. W. R. Co.* 52 Fed. 903 and cases cited; *Murray v. Chicago N. W. R. Co.*

supra. See New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627.

Without multiplying cases, it will be clearly seen that the Federal courts enforce "a common law," at least they have established rules of action independent of congressional or State laws and decisions, for the government and security of persons and property, which is the definition of "common law" as given by Kent.

## CHAPTER IV.

### "PLAIN, ADEQUATE, AND COMPLETE."

The statute requires that in order to oust the jurisdiction of equity there must not only be a remedy at law, but it must be "plain, adequate, and complete." Section 723 (U. S. Comp. Stat. 1901, p. 583), now sec. 267, New Judicial Code. *Farwell v. Colonial Trust Co.* 78 C. C. A. 22, 147 Fed. 480; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1; *Brown v. Arnold*, 67 C. C. A. 125, 131 Fed. 723; *Wiemer v. Louisville Water Co.* 130 Fed. 246; *Monmouth Invest. Co. v. Means*, 80 C. C. A. 527, 151 Fed. 160; *Miller v. Steele*, 82 C. C. A. 572, 153 Fed. 714; *Wolf v. Lovering*, 86 C. C. A. 281, 159 Fed. 91. This language leaves much to the discretion of the chancellor, and the circumstances of each particular case must control his discretion. *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Sullivan v. Portland & K. R. Co.* 94 U. S. 806, 24 L. ed. 324; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 396. We have here the "open door" through which the chancellor may escape from the mandatory feature of section 723. The frequent construction of the words "plain, adequate, and complete" has established certain rules by which these courts have been guided in assuming jurisdiction, and are as follows:

First. It is not enough that there be a remedy at law, but it must, in the discretion of the chancellor, be as plain, practical, efficient, and speedy as the remedy in equity, in order to decline jurisdiction in equity. *Barber v. Barber*, 21 How. 591, 16 L. ed. 229; *Tyler v. Savage*, 143 U. S. 95, 36 L. ed. 88, 12 Sup. Ct. Rep. 340; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improv. Co.* 96 Fed. 55; *Bank of Kentucky v. Stone*, 88 Fed. 390; *Smith v. American Nat. Bank*, 32 C. C. A. 368,

60 U. S. App. 431, 89 Fed. 839; *Western Assur. Co. v. Ward*, 21 C. C. A. 378, 41 U. S. App. 443, 75 Fed. 342; *Brun v. Mann*, 12 L.R.A.(N. S.) 154, 80 C. C. A. 513, 151 Fed. 154; *Brewster v. Lanyon Zinc Co.* 71 C. C. A. 213, 140 Fed. 816.

Second. That the legal remedy, both in respect of the final relief and the mode of obtaining it, must be as efficient in law as in equity. *Ibid.*; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 12, 43 L. ed. 346, 19 Sup. Ct. Rep. 77; *Kilbourn v. Sunderland*, 130 U. S. 505-515, 32 L. ed. 1005-1009, 9 Sup. Ct. Rep. 594; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 ed. 261; *Schmidt v. West*, 104 Fed. 272. Thus a bill may be brought for a stock of goods in the hands of a collector of customs, because they cannot be replevied (U. S. Rev. Stat. 934, U. S. Comp. Stat. 1901, p. 689). *Pollard v. Reardon*, 13 C. C. A. 171, 21 U. S. App. 639, 65 Fed. 849. See *His Imperial Majesty v. Providence Tool Co.* 23 Fed. 572.

Third. A court of equity is not justified in declining jurisdiction unless it appears that the legal remedy is neither obscure or doubtful as to its adequacy or completeness. (Authorities above.) However, inadequacy of the remedy at law does not mean that it fails to produce the money, but that in its nature and character it is not fitted or adapted to the end in view. *Thompson v. Allen County*, 115 U. S. 554, 29 L. ed. 473, 6 Sup. Ct. Rep. 140; *Rees v. Watertown*, 19 Wall. 124, 125, 22 L. ed. 77; *Buzard v. Houston*, 119 U. S. 352, 30 L. ed. 453, 7 Sup. Ct. Rep. 249; *Adams v. Murphy*, 91 C. C. A. 272, 165 Fed. 305. Thus, if the suit be for money by way of damages for fraud, a judgment at law is an adequate remedy, even though you may not be able to collect it by the usual process. This latter fact does not make the remedy inadequate within the meaning of section 723, but should the agreement procured by fraud be of a continuing nature, and rescission be necessary for complete relief, in addition to damages sought, then the judgment at law is not adapted to the end in view, and equity will take jurisdiction. *Ibid.*; *Alger v. Anderson*, 92 Fed. 708; *Shields v. McCandlish*, 73 Fed. 320; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 801; *Walker v. Brown*, 58 Fed. 29, 30; *Whitney v. Fairbank*, 54 Fed. 986; *Paton v. Majors*, 46 Fed. 211.

Fourth. A remedy at law is not adequate if it depends on the will of the opposing party. Thus, where an insurance company has delivered a policy through fraudulent representation a court of equity will maintain a suit to have the policy surrendered, and not force the complainant to await a suit at law. In such cases the remedy at law is not as efficient and prompt as in equity. *Schmidt v. West*, 104 Fed. 272, 274; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 397; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Bank of Kentucky v. Stone*, 88 Fed. 383, 391; *Union L. Ins. Co. v. Riggs*, 123 Fed. 317.

Fifth. The remedy at law to be adequate must be a remedy at law in the Federal court, where jurisdiction in equity is sought. *Coler v. Stanley County*, 89 Fed. 257; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Jones v. Mutual Fidelity Co.* 123 Fed. 518; *Brun v. Mann*, *supra*; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 763, 764; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 579, 37 L. ed. 856, 13 Sup. Ct. Rep. 936. It is not enough that there may be a remedy at law in the State courts. *Ibid.*; *Brun v. Mann*, 12 L.R.A.(N.S.) 154, 85 C. C. A. 513, 151 Fed. 153, 154; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 761; *Smyth v. Ames*, 169 U. S. 517, 42 L. ed. 838, 18 Sup. Ct. Rep. 418; *Schmidt v. West*, 104 Fed. 273. A party is not compelled to go into a foreign jurisdiction to avail himself of it (*United States L. Ins. Co. v. Cable*, *supra*); especially if by going into such jurisdiction he would be deprived of the right of introducing certain evidence that would be admissible in equity; or forfeit any right. *Ibid.*; *Mutual L. Ins. Co. v. Pearson*, 114 Fed. 397.

These rules are only suggestions to the chancellor's discretion. No iron-bound rule can be laid down, defining an adequate remedy at law to defeat jurisdiction in equity. The cases above cited show that if there be any fact in a case disabling a party from bringing it fairly and fully before a court of law, as when something is to be done, or some impediment to complete relief to be removed before complete relief can be had, then equity takes jurisdiction. *Beloit v. Morgan*, 7 Wall. 619, 17 L. ed. 205.



To illustrate: If you are suing to recover land upon a legal title, your action is at law, but if your remedy goes beyond a mere writ of possession in order to obtain complete enjoyment of the land, then jurisdiction is in equity.

Courts of equity have been very complacent and indulgent to themselves in cases of doubt. It is said, however, that equity courts must find some sensible ground for taking jurisdiction, and in the first mentioned case the court adopted the words "probable cause" to express the basis for assuming jurisdiction in equity. *Waite v. O'Neil*, 72 Fed. 353; *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682. I think it can be fairly stated that jurisdiction in equity will be taken unless by doing so there is a violent invasion of the jurisdiction of the court of law. *Ibid.*; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 10, 21 Mor. Min. Rep. 633; *Acord v. Western Pocahontas Corp.* 156 Fed. 997; *Rumbarger v. Yokum*, 174 Fed. 55. Or, to state it in another form: When the suit is for a simple recovery of money, without complications of any character, or for the recovery of specific real and personal property, without other process than a writ of possession, the jurisdiction is at law; all else falls within the jurisdiction of equity. *Scott v. Neely*, 140 U. S. 110, 35 L. ed. 358, 11 Sup. Ct. Rep. 712; *Whitehead v. Shattuck*, 138 U. S. 152, 34 L. ed. 874, 11 Sup. Ct. Rep. 276.

To refuse jurisdiction there must be no symptom of equity or equitable pretense, delusive or otherwise. *Waite v. O'Neil*, 72 Fed. 354; *Clark v. Wooster*, 119 U. S. 326, 30 L. ed. 393, 7 Sup. Ct. Rep. 217.

It will be found that bills in equity that have been dismissed because of an adequate remedy at law embrace either a suit for a simple debt, or the recovery of a specific real or personal property without other complications. *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *Scott v. Neely*, *supra*; *Hipp v. Babin*, 19 How. 278, 15 L. ed. 635; *Lewis v. Cocks*, 23 Wall. 470, 471, 23 L. ed. 71; *Hayward v. Andrews*, 106 U. S. 675, 27 L. ed. 272, 1 Sup. Ct. Rep. 544; *Gaines v. Miller*, 111 U. S. 398, 28 L. ed. 467, 4 Sup. Ct. Rep. 426; *Indian Land & T. Co. v. Schoenfelt*, 68 C. C. A. 196, 135 Fed. 485, 486. For reference I will give some of the

cases showing various conditions under which the rule has been applied, and in which it was held that the remedy at law was adequate and the bill dismissed. *Thompson v. Central Ohio R. Co.* 6 Wall. 134, 18 L. ed. 765; *Scott v. Neely*, 140 U. S. 110, 111, 35 L. ed. 360, 361, 11 Sup. Ct. Rep. 712; *Thompson v. Allen County*, 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Buzard v. Houston*, 119 U. S. 351, 30 L. ed. 452, 7 Sup. Ct. Rep. 249; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. Rep. 232; *Hurt v. Hollingsworth*, 100 U. S. 103, 104, 25 L. ed. 570, 571; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Whitehead v. Entwhistle*, 27 Fed. 778; *Lanier v. Alison*, 31 Fed. 100; *Morse Arms Mfg. Co. v. Winchester Repeating Arms Co.* 33 Fed. 184; *Mills v. Knapp*, 39 Fed. 595; *Jaffrey v. Bear*, 42 Fed. 569; *Walker v. Brown*, 58 Fed. 23; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 801; *Walker v. Brown*, 11 C. C. A. 135, 27 U. S. App. 291, 63 Fed. 205; *Strang v. Richmond, P. & C. R. Co.* 93 Fed. 72-75; *Alger v. Anderson*, 92 Fed. 699, 709, 712; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 517; *Sewerage & Water Board v. Howard*, 99 C. C. A. 177, 175 Fed. 555; *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. ed. 796, 29 Sup. Ct. Rep. 426; *United States v. Bitter Root Development Co.* 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318, S. C. 66 C. C. A. 652, 133 Fed. 274; *Ambler v. Choteau*, 107 U. S. 586-591, 27 L. ed. 322-324, 1 Sup. Ct. Rep. 556; *McKinley v. Lloyd*, 128 Fed. 519; *Powell v. Louisville*, 73 C. C. A. 276, 141 Fed. 960; *Farwell v. Colonial Trust Co.* 78 C. C. A. 22, 147 Fed. 480; *Griesa v. Mutual L. Ins. Co.* 94 C. C. A. 635, 169 Fed. 509; *Pacific States Supply Co. v. San Francisco*, 171 Fed. 727; *Buchanan v. Adkins*, 99 C. C. A. 246, 175 Fed. 692; *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404.

## CHAPTER V.

### WHEN A COURT OF EQUITY WILL ENFORCE A PURELY LEGAL REMEDY.

There is no question that a legal right will be enforced if the remedy sought be equitable (*Smith v. American Nat. Bank*, 32 C. C. A. 368, 60 U. S. App. 431, 89 Fed. 839, 840); that is to say, if some equitable relief is necessary to sustain or support the legal right, such as specific performance, rescission, reformation, or injunction, equity will take jurisdiction and give both legal and equitable relief; but there are conditions under which a court of equity will give a purely legal remedy. The rule may be stated as follows: When a court of equity has rightfully obtained jurisdiction, it will retain it for complete relief though it be purely legal, as—

First. When jurisdiction is taken upon an alleged equity which ceases before the suit ends, or is dissipated by the evidence on the trial of the cause, the court will administer the legal remedy. However, this rule is dependent upon the utmost good faith in setting up the equitable phase through which the jurisdiction is sought. If it should appear that the complainant had no reasonable ground upon which to base the equity the court should dismiss the bill. In *Clark v. Wooster*, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 217, it is said that if the case was one for equitable relief the mere fact that the ground for such relief expired, etc., it would not take away the jurisdiction and preclude the court from granting the relief belonging to the case as made. *Griswold v. Hilton*, 87 Fed. 257; *Waite v. O'Neil*, 34 L.R.A. 550, 22 C. C. A. 248, 47 U. S. App. 19, 76 Fed. 408, 72 Fed. 348; *Kirk v. DuBois*, 28 Fed. 460; *Shainwald v. Lewis*, 69 Fed. 492; *Hohorst v. Howard*, 37 Fed. 97; *Chambers v. Cannon*, 62 Tex. 293, 294.

The rule of the text-books is that courts of equity should not entertain jurisdiction of bills where damages or compensation in money, which are purely legal remedies, are sought,

except when they are purely incidents to equitable relief; and when damages are so sought and there is no ground for the equitable relief demanded, the bill should be dismissed. Where there are no liens, or no trust involved, or the equitable features are not apparent, courts should decline jurisdiction. *Dowell v. Mitchell*, 105 U. S. 432, 26 L. ed. 1143; *Dakin v. Union P. R. Co.* 5 Fed. 665; *Beers v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 273, 141 Fed. 959. The case of *Alger v. Anderson*, 92 Fed. 697-714, reviews the English and American cases, and sustains the rule as above stated. *Root v. Lake Shore & M. S. R. Co.* 105 U. S. 189, 26 L. ed. 975; *Dowell v. Mitchell*, 105 U. S. 430, 26 L. ed. 1142; *Germain v. Wilgus*, 14 C. C. A. 561, 29 U. S. App. 564, 67 Fed. 600; *Corbin v. Taussig*, 137 Fed. 153; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 515; *India Rubber Co. v. Consolidated Rubber Tire Co.* 117 Fed. 355; *Clark v. Wooster*, 119 U. S. 325, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; *Cherokee Nation v. Southern Kansas R. Co.* 33 Fed. 915; *Killian v. Ebbinghaus*, 110 U. S. 574, 28 L. ed. 248, 4 Sup. Ct. Rep. 232; *Buzard v. Houston*, 119 U. S. 351, 30 L. ed. 452, 7 Sup. Ct. Rep. 249; *Whitehead v. Shattuck*, 138 U. S. 151, 34 L. ed. 874, 11 Sup. Ct. Rep. 276; *United States v. Bitter Root Development Co.* 133 Fed. 274. (See reference cases cited at the end of chapter 4.) In most of the cases cited, the equity set up was a pretext. *Ibid.*; *Burdell v. Comstock*, 15 Fed. 395; *Powell v. Louisville*, 73 C. C. A. 276, 141 Fed. 961, 962; *Truman v. Holmes*, 31 C. C. A. 215, 56 U. S. App. 739, 87 Fed. 743, 744; *Lewis v. Cocks*, 23 Wall. 469, 23 L. ed. 70; *McDonald v. Miller*, 84 Fed. 345; *Thompson v. Central Ohio R. Co.* 6 Wall. 136, 18 L. ed. 767; *United States v. Wilson*, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; *Waite v. O'Neil*, 72 Fed. 355. These cases do not militate against the rule, that if jurisdiction existed when the bill was filed the mere fact that the equity was dissipated during the trial would not exclude incidental relief, though it be entirely legal. *Hohorst v. Howard*, *supra*; *Clark v. Wooster*, 119 U. S. 322, 30 L. ed. 392, 7 Sup. Ct. Rep. 217; *Waite v. O'Neil*, *supra*; *Cosmos Exploration Co. v. Gray Eagle Oil Co.* 61 L.R.A. 230, 50 C. C. A. 79, 112 Fed. 10, 21 Mor. Min. Rep. 633; *Acord v. Western Pocahontas Corp.* 156 Fed. 997. But the legal relief sought must not be inconsistent or antag-

onistic to the alleged equity. Thus, damages sought must grow out of, or be connected with, the equity set up. *Metcalf v. American School Furniture Co.* 108 Fed. 911; *Du Pont v. Abel*, 81 Fed. 535.

Second. When a suit in equity is necessary to settle a matter in issue between parties, the court will administer complete relief, though, as to some matters involved, adequate relief may have been afforded by an action at law. *Krohn v. Williamson*, 62 Fed. 877; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 263, 102 Fed. 19; *Williamson v. Monroe*, 101 Fed. 322; *Re Leeds Woolen Mills*, 129 Fed. 926.

Third. A court of equity will take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction calls for adjudication on purely legal rights and to confer purely legal relief. The formula has been stated as follows: "An adequate remedy at law does not exist where a multiplicity of actions are required to obtain complete relief." *Oelrichs v. Spain* (*Oelrichs v. Williams*) 15 Wall. 227, 21 L. ed. 44; *Mutual L. Ins. Co. v. Blair*, 130 Fed. 971; *Mills v. Chicago*, 127 Fed. 735; *Smith v. Bivens*, 56 Fed. 353; *Sanford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546-548; *Preteca v. Maxwell Land Grant Co.* 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 676; *Dinsmore v. Southern Exp. Co.* 92 Fed. 714; *Bausman v. Denny*, 73 Fed. 70; *Grand Trunk Western R. Co. v. Chicago & E. I. R. Co.* 73 C. C. A. 43, 141 Fed. 795; *General Electric Co. v. Westinghouse Electric & Mfg. Co.* 144 Fed. 468; *Tift v. Southern R. Co.* 123 Fed. 790-795; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 695; *Ozark-Bell Teleph. Co. v. Springfield*, 140 Fed. 666; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 553.

Where numerous persons have a community of interest, or a common right or title in the subject-matter in controversy, against a common adversary, involving the same questions of law and fact, equity will take jurisdiction. *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contract Co.* 57 Fed. 45; *Ulman v. Jaeger*, 67 Fed. 980-983; *Sang Lung v. Jackson*, 85 Fed. 502; *Osborne v. Wisconsin C. R. Co.* 43 Fed. 824.

Again, wherever there is a common point of interest between the complainant and several dependants separately liable, the

remedy at law is not as efficient as in equity (*Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 257-264 and authorities cited); but, as said in the last case, "there is no hard and fast rule by which jurisdiction in equity, on the ground of avoiding a multiplicity of suits, can be determined;" and as said in *Hale v. Anderson*, 188 U. S. 77, 47 L. ed. 392, 23 Sup. Ct. Rep. 244, "Each case, if not brought directly within the principle of some preceding case, must be decided upon the substantial convenience of all parties etc." *Wyman v. Bowman*, supra. In *Hosmer v. Wyoming R. & I. Co.* 65 C. C. A. 81, 129 Fed. 888, the same rule is substantially stated, and it is added that, "it often becomes a nice question whether the convenience of the complainant outweighs the inconvenience of the defendants arising from the joinder of two or more causes of action in a single suit, and whether the relation between the causes of action is sufficiently apparent to present a common point of controversy" (see authorities cited in this case). See *Buchanan Co. v. Adkins*, 99 C. C. A. 246, 175 Fed. 791; *Hyman v. Wheeler*, 33 Fed. 630; *De Forest v. Thompson*, 40 Fed. 375.

Again, the complainant to invoke the jurisdiction must be the party threatened and not the fact that the defendant may be subjected to a multitude of suits. *Thomas v. Council Bluffs Canning Co.* 34 C. C. A. 428, 92 Fed. 422; *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.* 97 C. C. A. 400, 173 Fed. 892. See *Headrick v. Larson*, 81 C. C. A. 378, 152 Fed. 93.

Again, it is said in *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 286, 53 L. ed. 800, 29 Sup. Ct. Rep. 426, that "where the multitude of suits to be feared consists in repetitions of suits by the same person against the complainant for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground, unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of parties." It is suggested, further, that it might be necessary to await the final decision of one suit at law, citing *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720, and *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434.

## CHAPTER VI.

### WHEN SECTION 723 MUST BE SET UP AS A DEFENSE TO BE EFFECTIVE.

This section, though mandatory in form, was intended to preserve the right of trial by jury, which may be waived. It has never been treated by the Federal courts as a fundamental principle of jurisdiction; that is, it has not been placed in the same plane with such tests of jurisdiction as "diversity of citizenship" (Waite v. O'Neil, 72 Fed. 351), but has been treated as directory, and as a matter of simple abatement subject to waiver. Green v. Turner, 98 Fed. 760. The courts uniformly hold that when set up as a defense it must be pleaded at the first opportunity; and there is no question that where a bill presents a case in which it is competent for a court of equity to grant relief, and it has jurisdiction of the subject-matter, an objection to jurisdiction under section 723 must be pleaded *in limine* by plea, demurrer, or answer, or it is waived. Southern P. R. Co. v. United States, 66 C. C. A. 581, 133 Fed. 651; Hapgood v. Berry, 85 C. C. A. 171, 157 Fed. 807-812; Hawkeye Gold Dredging Co. v. State Bank, 157 Fed. 253, 258; Accord v. Western Pocahontas Corp. 156 Fed. 990; Quirk v. Quirk, 155 Fed. 199; McCloskey v. Pacific Coast Co. 22 L.R.A. (N.S.) 673, 87 C. C. A. 568, 160 Fed. 795-801; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; Brown & B. Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Rep. 604; Sloss Iron & Steel Co. v. South Carolina & G. R. Co. 162 Fed. 542; Odbert v. Marquet, 99 C. C. A. 60, 175 Fed. 44; Dederick v. Fox, 56 Fed. 714-717; Reynolds v. Watkins, 9 C. C. A. 273, 22 U. S. App. 83, 60 Fed. 824; Western Electric Co. v. Reedy, 66 Fed. 164; Kilbourn v. Sunderland, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594. The above-cited cases sufficiently show that section 723 must be pleaded at the threshold of the case, or it is waived,

when the subject-matter of the suit is of a class over which a court of equity has jurisdiction, or even if there be a doubt, and it is competent to grant the relief sought. *Ibid.*; *Preteca v. Maxwell Land Grant Co.* 1 C. C. A. 607, 4 U. S. App. 326, 50 Fed. 674; *Waite v. O'Neil*, 72 Fed. 351-354; *Tyler v. Savage*, 143 U. S. 94, 36 L. ed. 88, 12 Sup. Ct. Rep. 340. In such cases, it is a personal privilege that may be waived. *Ibid.*; *Warmath v. O'Daniel*, 16 L.R.A.(N.S.) 414, 86 C. C. A. 277, 159 Fed. 87; *Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 322; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477; *International Trust Co. v. Norwich Union F. Ins. Co.* 17 C. C. A. 608, 36 U. S. App. 277, 71 Fed. 83.

The rule as above stated may be illustrated when suit is brought for specific performance. If the allegations are sufficient, a *prima facie* case of jurisdiction appears; but if, under the facts, the court may determine them insufficient to grant specific performance, unless an issue as to the jurisdiction has been raised *in limine*, the court will retain the bill under the prayer for general relief, and give judgment for the damages asked. *Waite v. O'Neil*, 72 Fed. 354; *Mobile County v. Kimball*, 102 U. S. 707, 26 L. ed. 243. When construed to be a personal privilege it comes too late after answer filed or after appeal. *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186, 116 Fed. 854, 855; *Preteca v. Maxwell Land Grant Co.* *supra*; *Waite v. O'Neil*, 72 Fed. 355; *Schoolfield v. Rhodes*, 27 C. C. A. 95, 49 U. S. App. 486, 82 Fed. 157. However, it is not the invariable rule that if not set up *in limine* the court will not dismiss, for, as said in *Reynolds v. Watkins*, 9 C. C. A. 273, 22 U. S. App. 83, 60 Fed. 825, neither consent or negligence can give a court jurisdiction when there is no reasonable doubt that the bill brings into court matters that are cognizable in a court of law alone. *Ibid.* The true rule is that where the plaintiff, upon the face of the bill, shows he has a complete, "adequate remedy at law, and no other equitable relief is prayed for, it is not necessary that the objection be taken *in limine*, but may be made at any stage of the case, or the court may raise the objection *sua sponte*, which is the clear duty of the court." *Southern P. R. Co. v. United States*, 66 C. C. A. 581, 133 Fed. 655 and authorities cited; *Lewis v. Cocks*, 23 Wall.



470, 471, 23 L. ed. 71; Allen v. Pullman Palace Car Co. 139 U. S. 662, 35 L. ed. 305, 11 Sup. Ct. Rep. 682; Mills v. Knapp, 39 Fed. 595. Where, then, there is an entire absence of any equitable phase, either in the case made or relief sought, the provisions of section 723 become jurisdictional, to be set up, as said, at any stage of the proceeding down to the final hearing on appeal. Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 227, 228, 21 L. ed. 44; Kane v. Luckman, 131 Fed. 621 and authorities cited. Marthinson v. King, 82 C. C. A. 360, 150 Fed. 49; Tyler v. Savage, 143 U. S. 97, 36 L. ed. 89, 12 Sup. Ct. Rep. 340; Thompson v. Central Ohio R. Co. 6 Wall. 136, 18 L. ed. 767; United States v. Wilson, 118 U. S. 86, 30 L. ed. 110, 6 Sup. Ct. Rep. 991; Curry v. McCauley, 11 Fed. 370; Dowell v. Mitchell, 105 U. S. 432, 26 L. ed. 1143; Kramer v. Cohn, 119 U. S. 357, 30 L. ed. 440, 7 Sup. Ct. Rep. 277; Sullivan v. Portland & K. R. Co. 94 U. S. 811, 24 L. ed. 326; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 536, 33 L. ed. 1025, 10 Sup. Ct. Rep. 604.

This brings us to discuss—

*When the Court Will Dismiss Bill, Though Not Set Up as a Defense.*

Having seen that the defense under section 723 is a privilege that may be waived if not plead *in limine*, and having intimated before that the failure to file such defense does not always have the effect of holding jurisdiction in equity, I will now state under what conditions a court of equity will entertain the objection to its jurisdiction, under section 723, by motion, or by simple suggestion, or *sua sponte*.

If the bill on its face is clearly obnoxious to the provisions of section 723, then, whether pleaded or not, the court will dismiss on motion, or, if the bill goes to proof and there is an entire absence of evidence showing any reasonable ground upon which plaintiff could have expected relief in equity, the court will dismiss. (See authorities above.) The rule then may be stated, that if a court of equity, upon examination of the proofs, can find no ground for a proper case within its jurisdiction, and it further appears that complainant *could not reasonably* have expected equitable relief, then the court should, on its own motion, S. Eq.—3.

tion, or upon the motion or suggestion of the respondent, dismiss the bill at any stage of the cause; but, on the other hand, if the subject-matter of the suit, or the relief sought, belongs to a class of which a court of equity might take jurisdiction, or equitable relief can be granted to complete the remedy, though there may be some doubt, then you must set up the defense by plea or answer *in limine*. (Authorities above.) *Erskine v. Forrest Oil Co.* 80 Fed. 586, 18 Mor. Min. Rep. 297; *Alger v. Anderson*, 92 Fed. 697; *Kansas City Southern R. Co. v. Quigley*, 181 Fed. 190.

From this discussion of section 723, you will observe, as said in *Waite v. O'Neil*, 72 Fed. 355, that, notwithstanding its mandatory feature, "jurisdiction is never declined by courts of equity, unless there was a stripping to the bone of pure legal cognizance, and of every delusive pretense of equitable cognizance relied on in the particular case; and wherever this process did not expose in the bone a case of pure and untinged legal jurisdiction, the equitable power to deal with it was maintained, whether the objection be made *in limine* or not." Occasionally the courts have sought to emphasize the importance of section 723 as a measure intended to preserve the right of trial by jury, but they have only been eddies in the great tide of decisions which establish jurisdiction upon the suspicion of an equity.

### *How Defense to Be Made.*

If the bill presents a naked legal claim, the objection may be raised by demurrer (*Consolidated Roller-Mill Co. v. Combs*, 39 Fed. 26); but if not apparent on face of bill, then the defense of an adequate remedy at law may be set up by plea or answer. *Southern P. R. Co. v. United States*, 66 C. C. A. 581, 133 Fed. 651. In *Desert King Min. Co. v. Wedekind*, 110 Fed. 873, it is said that an objection to the jurisdiction of the court for any reason not apparent on the face of the bill must be taken by special plea, and cannot be raised by motion. The rule is, where the objection must be taken *in limine*, it may be taken by demurrer if apparent on the bill, or by plea or answer if not apparent; and where the objection may be taken at any stage of the proceeding, as above stated, it may be taken by motion or in any other manner of directing the court's attention to it (110 Fed. 877).

## CHAPTER VII.

### JURISDICTION OF THE CIRCUIT COURT IN EQUITY.

Having determined that you have not a plain, adequate remedy at law, and your right to relief is not obnoxious to any of the requirements embodied in the maxims of equity, the next step would be to determine who are to be the parties to your bill; but inasmuch as it is peculiar to Federal courts that certain situations as to residence or citizenship may prevent any procedure in these courts against persons who may be proper, necessary, or indispensable parties to your suit; and inasmuch as the jurisdiction of Federal courts is dependent upon other statutory conditions and limitations which must appear in your pleadings, I will now proceed to discuss these conditions precedent to a suit in a Federal equity court, and in connection therewith to set forth as much of the Federal statute law affecting the jurisdiction of the court as is necessary to be understood to frame your pleadings so as to acquire the jurisdiction sought.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168; *Illinois C. R. Co. v. Adams*, 180 U. S. 528, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Ex parte Moran*, 75 C. C. A. 396, 144 Fed. 604; *Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 635, 19 U. S. App. 576, 60 Fed. 318; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 570. But in going into a Federal court there are two conditions to be considered, affecting your right:

First. Equitable as distinguished from legal.

Second. Federal as distinguished from State jurisdiction.

As to the first, a full discussion was presented to you in lectures upon "Equitable Jurisprudence," and referred to in a measure in discussing section 723 of U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 583), so I will pass to the discussion of Federal as distinguished from State jurisdiction.

Article 3, section 1, of the Federal Constitution, vests the judicial power of the United States in one Supreme Court and such other inferior courts as Congress may from time to time ordain. It is thus seen that the Constitution provides only for one court, the Supreme Court, and fixes its original jurisdiction, and leaves to Congress unlimited power in ordaining and establishing all inferior courts and distributing within its discretion the judicial power indicated in section 2, article 3, among them.

Section 2 of this article extends the judicial power to all cases in law and equity arising under the Constitution and laws of the United States, and treaties made or which shall be made under their authority.

Second. To controversies between a State and citizens of another State.

Third. To controversies between citizens of different States.

Fourth. Between citizens of the same State claiming lands under grants from a different State. *Stevenson v. Fain*, 195 U. S. 168, 169, 49 L. ed. 143, 144, 25 Sup. Ct. Rep. 6.

Fifth. Between a State, or the citizens thereof, and foreign States, citizens, or subjects. *Pennsylvania v. Quicksilver Min. Co.* 10 Wall. 553, 19 L. ed. 998; *Alabama v. Burr*, 115 U. S. 413, 29 L. ed. 435, 6 Sup. Ct. Rep. 81; *Wisconsin v. Duluth*, 96 U. S. 379, 24 L. ed. 668.

Sixth. Controversies in which the United States shall be a party. *United States ex rel. Maxwell v. Barrett*, 135 Fed. 193; *United States v. American Bell Teleph. Co.* 167 U. S. 225, 42 L. ed. 144, 17 Sup. Ct. Rep. 809; *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1086. See *United States use of Edward Hines Lumber Co. v. Henderlong*, 102 Fed. 2; *United States use of Salem-Bedford Stone Co. v. Sheridan*, 119 Fed. 236; *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715; *United States v. Churchyard*, 132 Fed. 82, 85; *United States v. Texas*, 143 U. S. 640, 36 L. ed. 291, 12 Sup. Ct. Rep. 488; *United States v. Michigan*, 190 U. S. 379, 47 L. ed. 1103, 23 Sup. Ct. Rep. 742; *United States v. North Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. Rep. 920.

Seventh. Controversies between two or more States. *Virginia v. West Virginia*, 206 U. S. 290, 51 L. ed. 1068, 27 Sup.

Ct. 732; *Florida v. Georgia*, 11 How. 293, 13 L. ed. 702; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Kansas v. Colorado*, 185 U. S. 125, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *New Jersey v. New York*, 3 Pet. 461, 7 L. ed. 741.

Eighth. To admiralty and maritime jurisdiction.

Ninth. To all cases affecting ambassadors, other public ministers, and consuls.

The 11th Amendment to the Constitution provides that the judicial power of the United States shall not be construed to extent to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State. *South Dakota v. North Carolina*, 192 U. S. 315, 48 L. ed. 459, 24 Sup. Ct. Rep. 269; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Chisolm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *New Hampshire v. Louisiana*, 108 U. S. 76-91, 27 L. ed. 656-662, 2 Sup. Ct. Rep. 176; *United States v. Lee*, 106 U. S. 204-206, 27 L. ed. 176, 177, 1 Sup. Ct. Rep. 240; *Hans v. Louisiana*, 134 U. S. 9-15, 33 L. ed. 845-847, 10 Sup. Ct. Rep. 504; *North Carolina v. Temple*, 134 U. S. 30, 33 L. ed. 852, 10 Sup. Ct. Rep. 509; *Fitts v. McGhee*, 172 U. S. 524, 43 L. ed. 539, 19 Sup. Ct. Rep. 269. The limits of the judicial power thus defined, it is left to Congress to prescribe how much of it is to be exercised by the inferior courts it creates. In this, Congress is supreme in discretion and power. *Lewis Pub. Co. v. Wyman*, 152 Fed. 202; *Sewing Mach. Co.'s Case (Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.)* 18 W<sup>2</sup>. 553, 21 L. ed. 914; *United States v. Haynes*, 29 Fed. 1; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 521, 42 L. ed. 1130, 18 Sup. Ct. Rep. 685. The Constitution gives the capacity to take, and an act of Congress must have supplied it. *Nashville v. Cooper*, 6 Wall. 247-250, 18 L. ed. 851, 852. We must, then, look to the Constitution to see if Congress has acted within its limits in distributing the powers granted, and to the acts of Congress to determine what courts have been

created, and the extent of jurisdiction granted to each, remembering that the number, character, jurisdiction, and territorial limits of these inferior courts rests entirely in the discretion of Congress. *Anderson v. Bassman*, 140 Fed. 10; *United States v. Mar Ying Yuen*, 123 Fed. 159; *United States v. Haynes*, 29 Fed. 696; *United States v. Union P. R. Co.* 98 U. S. 605, 25 L. ed. 151; *Gaines v. Fuentes*, 92 U. S. 18, 23 L. ed. 527; *Sewing Mach. Co.'s Case (Grover & B. Sewing Mach. Co. v. Florence Sewing Mach. Co.)* 18 Wall. 577, 21 L. ed. 919; *Risley v. Utica*, 168 Fed. 744.

### *What Courts Were Created.*

As said, the Constitution having created the Supreme Court and fixed its original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party (U. S. Rev. Stat. sec. 687, U. S. Comp. Stat. 1901, p. 565; Const. art. 3, sec. 2. See also Rev. Stat. sec. 563, cl. 17, U. S. Comp. Stat. 1901, p. 459, as to consuls; *Re Baiz*, 135 U. S. 417, 34 L. ed. 226, 10 Sup. Ct. Rep. 854; *Cooley v. Luco*, 76 Fed. 146; *Texas v. Lewis*, 14 Fed. 65; *Froment v. Duclos*, 30 Fed. 385; *Börs v. Preston*, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 407; *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448, 24 Sup. Ct. Rep. 269; *Washington v. Northern Securities Co.* 185 U. S. 255, 46 L. ed. 897, 22 Sup. Ct. Rep. 623; *Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497, 21 Sup. Ct. Rep. 331; *Ames v. Kansas*, 111 U. S. 465, 28 L. ed. 489, 4 Sup. Ct. Rep. 437), and given to it appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make (art. 2, sec. 2, cl. 2), Congress can enlarge neither the one or the other, but it may determine how far within the limits of the capacity of the court to take, appellate jurisdiction shall be given and exercised by it. *California v. Southern P. Co.* 157 U. S. 261, 39 L. ed. 695, 15 Sup. Ct. Rep. 591; Const. art. 3, sec. 2; *Marbury v. Madison*, 1 Cranch. 137, 2 L. ed. 60; *Ex parte Yerger*, 8 Wall. 104, 19 L. ed. 338; *Daniels v. Chicago & R. I. R. Co.* 3 Wall. 254, 18 L. ed. 225;

*Wisconsin v. Pelican Ins. Co.* 127 U. S. 300, 32 L. ed. 246, 8 Sup. Ct. Rep. 1370.

See section 233 of New Code, chapter 10, in substance as follows: The Supreme Court has exclusive jurisdiction where a State is a party, except between a State and its citizens or citizens of other States or aliens, in which latter cases it has original, but not exclusive, jurisdiction. See also New Code, chap. 11, sec. 256, clause 7.

It has exclusive jurisdiction in suits against ambassadors or other public ministers or their domestics or servants; and original, but not exclusive, jurisdiction of suits brought by ambassadors or other public ministers, or in which a consul or vice consul is a party. See also New Code, sec. 256, par. 8. Also chap. 2, New Code, p. 18.

The appellate jurisdiction is embodied in sections 236 and 237 of the New Code. By sec. 234 of the New Code the Supreme Court may issue writs of prohibition in cases provided therein. By sec. 262 of the New Code it may issue all writs necessary to its jurisdiction.

### *Courts Established by Congress.*

Congress, acting within its powers, in 1789 passed the first judiciary act, establishing circuit and district courts, defining their powers, or rather the jurisdiction of each. This original act was amended from time to time, and as amended will be found in title 13 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 306, which set forth the basis of the jurisdiction of the circuit courts until 1875, when the jurisdiction was vastly increased by giving to these courts jurisdiction over all cases when the matter in dispute arose under the Constitution and laws of the United States, or treaties made or which shall be made under their authority, and further increased it by providing for bringing in parties within the jurisdiction of the court who lived beyond the territorial limits or jurisdiction of the court in which the suit was pending, by personal or published service of its process. The jurisdictional act was again amended in 1887, and perfected in 1888, by which the jurisdiction was diminished by enlarging the amount

of value of the subject-matter in dispute from five hundred dollars, exclusive of costs, as in the act of 1875, to two thousand dollars, exclusive of interest and costs. So title 13 of U. S. Rev. Stat., together with the acts of 1875, 1887 and 1888, contain generally the statutory provisions in force governing the jurisdiction of the Federal courts.

*Acts of 1887 and 1888.*

The acts of 1887 and 1888 are identical, the act being simply perfected in 1888 by changes in grammar. This act, which now controls the jurisdiction of the circuit courts of the United States, provides that the circuit courts of the United States shall have original cognizance "*concurrent* with the courts of the State" of *all suits* of a civil nature in law or equity.

I will first call your attention to the words "concurrent with the courts of the State."

The field of jurisdiction proposed to be given to the Federal courts by the Constitution of the United States as submitted to the States was made a point of attack by the opponents of that instrument, but Mr. Hamilton contended that there was no deprivation of State jurisdiction, except when the delegation of jurisdiction was exclusive in the Federal courts, or expressly prohibited to the State courts. Congress acted upon this view in 1789, and gave it expression in the word "concurrent," and, as said in *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544, upon State courts, equally with the Federal courts, devolves the duty of protecting and enforcing the Constitution and laws of the United States. See *Lewis Pub. Co. v. Wyman*, 152 Fed. 203.

You will further observe the words, "all suits in law or equity." Suit applies to any proceeding in a court of justice by which one pursues that remedy that law or equity affords him. If a right is to be litigated, it is a suit. *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 702; *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.* 63 C. C. A. 62, 128 Fed. 340; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Re Stutsman County*, 88 Fed. 337-340; *Gaines v. Fuentes*, 92 U. S. 20, 23 L. ed. 528; *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Erig. Co.* 158 Fed. 140. The statute then



proceeds to state the conditions under which this concurrent jurisdiction with State courts can be exercised, as follows:

First. When a suit of a civil nature in law or equity arises under the Constitution and laws of the United States, or treaties made, or to be made, when the amount or value in dispute exceeds two thousand dollars, exclusive of interest and costs.

Second. When the controversy is between citizens of different States, and the amount or value in dispute exceeds two thousand dollars, exclusive of interest and costs.

Third. When the controversy is between citizens of a State and foreign State's citizens and subjects, and the amount or value in dispute exceeds two thousand dollars, exclusive of interest and costs.

Fourth. As between citizens of the same State claiming land under a grant from a different State.

Fifth. When the United States are plaintiffs, without reference to amount.

By sections 1 and 4, as above arranged, the jurisdiction is not dependent on citizenship, but the Federal courts take their jurisdiction from the *nature of the subject-matter*. The issues arising under these provisions are made *Federal questions*, which may be litigated in the United States courts between citizens of the same State.

By sections 2 and 3, as above arranged, the jurisdiction is based on diversity of citizenship; that is, all the parties plaintiff must be of a different citizenship from the parties defendant; or the citizens of a State on one side, and citizens or subjects of foreign States, *viz.* aliens, on the other side.

It is thus seen that the jurisdiction of the circuit courts of the United States is a limited one, and the basis of their jurisdiction over property rights, with which alone equity deals, is limited either to diversity of citizenship or the existence of a Federal question, and where the amount or value involved is in excess of two thousand dollars, exclusive of interest and costs, except in cases where the United States are parties plaintiff (*Municipal Invest. Co. v. Gardiner*, 62 Fed. 955; *Byers v. McAuley*, 149 U. S. 618, 37 L. ed. 872, 13 Sup. Ct. Rep. 906), and within these limitations the United States courts determine for themselves the limits of their jurisdiction. *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 6. As to the power of Con-

gress to confer judicial authority on the courts of States, see *Levin v. United States*, 63 C. C. A. 476, 128 Fed. 828-833, and authorities cited.

### *The New Judicial Code.*

Under the New Judicial Code, sec. 289, chap. 13, passed March 3d, 1911, to take effect January 1st, 1912, circuit courts are abolished, and on said date last referred to, the records, books, dockets, etc., belonging to or connected with the circuit courts, are to be delivered to the clerks of the district courts, and are to become and remain part of the official records of the district courts, and the said district courts are to exercise all powers heretofore vested in the circuit courts; and the clerks of said district courts are to exercise all powers vested in the clerks of the circuit courts prior to the taking effect of said act.

By sec. 291 of the same Code all suits pending in the circuit courts at the taking effect of the Judicial Code are to be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein.

By sec. 292, if in any law not contained in this act reference is made to, or any power or duty is conferred or imposed upon the circuit courts, it shall, after the act takes effect, be held to refer to and confer the power and impose the duty on the district courts.

By sec. 294 the provisions of the New Code, so far as they are substantially the same, shall be considered continuations of the old law, and not new enactments.

By chap. 2, sec. 24, of the New Code, the amount involved in the controversy to give jurisdiction after the act takes effect must exceed three thousand dollars exclusive of interest and costs, when the controversy arises under the Constitution or laws of the United States or treaties made or which shall be made, or where the controversy is between citizens of different States, or between citizens of a State and foreign States, citizens, or subjects.

### *Repealing Clause of the New Code.*

By chap. 14, sec. 297, all acts and parts of acts, in so far as

they are embraced within and superseded by the new Judicial Code, are hereby repealed. The remaining portions of such acts not embraced within the new act, or by it specially repealed, are to remain in full force.

*Courts of Equity Deal Only With Property Rights.*

As said, within these limits, courts of equity deal only with property rights and the maintenance of obligations between citizens which affect them. *Taylor v. Kercheval*, 82 Fed. 497; *Re Sawyer*, 124 U. S. 210, 31 L. ed. 405, 8 Sup. Ct. Rep. 482. They will not deal with matters of an executive or political nature, nor do they interfere with the duties of any department of government, unless absolutely necessary to maintain and protect the rights of property (*Ibid.*); and in dealing with property rights these limitations, as set forth, require the suit to be between citizens of different States, or citizens of a State and aliens, or the right must depend on a proper construction of the Constitution or laws of the United States, or treaties made by their authority; and in either case the amount or value of the subject matter in issue must exceed the sum of two thousand dollars, exclusive of interest and costs. In a word, the existence of one of these conditions with proper amount is fundamental, and *consent* cannot supply absence. *Minnesota v. Northern Securities Co.* 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598; *Re Winn*, 213 U. S. 459, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, 53 L. ed. 126, 29 Sup. Ct. Rep. 42; *Thomas v. Ohio State University*, 195 U. S. 207, 49 L. ed. 160, 25 Sup. Ct. Rep. 24; *Henrie v. Henderson*, 76 C. C. A. 196, 145 Fed. 316; *Iowa Lillovet Gold Min. Co. v. Bliss*, 144 Fed. 446; *Anderson v. Bassman*, 140 Fed. 10; *Olds Wagon Works v. Benedict*, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 5; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520; *Byers v. McCauley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906. And the jurisdiction depends on the existence of these conditions at the beginning of the suit. *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 819; *Ritchie v. Burke*, 109 Fed. 19; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449.

*Presumption of Jurisdiction.*

The jurisdiction being limited, the presumption is against jurisdiction, unless it affirmatively appears (*Yeandle v. Pennsylvania R. Co.* 95 C. C. A. 282, 169 Fed. 941; *Hanford v. Davies*, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; *Grace v. American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207; *Garner v. Southern Mut. Bldg. & L. Asso.* 28 C. C. A. 381, 52 U. S. App. 344, 84 Fed. 3; *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 464, 50 U. S. App. 280, 85 Fed. 869; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Robertson v. Cease*, 97 U. S. 649, 24 L. ed. 1058; *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552), the rule being that courts created by statute can only have the jurisdiction given. *United States v. Southern P. R. Co.* 49 Fed. 300, and cases cited. However, a judgment is not subject to collateral attack, where jurisdiction has been exercised, though not apparent. *Evers v. Watson*, 156 U. S. 527-533, 39 L. ed. 520-522, 15 Sup. Ct. Rep. 430; *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Of course, there are many acts of Congress giving special or exclusive jurisdiction to the Federal courts in such matters as concern the revenues of the United States, also bankrupt laws, interstate commerce, copyrights, patents, etc., which are not controlled by the general jurisdictional acts; therefore they do not fall within the purpose of these lectures, as I propose only to deal with the fundamental conditions required by the general acts governing the Federal courts of equity. *United States v. Standard Oil Co.* 152 Fed. 290-293; *Sunderland Bros. v. Chicago R. I. & P. R. Co.* 158 Fed. 877; *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 858; *Edmunds v. Illinois C. R. Co.* 80 Fed. 79; *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 981; *Re Horhorst*, 150 U. S. 653-661, 37 L. ed. 1211-1214, 14 Sup. Ct. Rep. 221; *Northern Securities Co. v. United States*, 193 U. S. 199, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Barnhard Bros. & Spindler v. Morrison* (Tex. Civ. App.) 87 S. W. 376, 377; *Gulf, C. & S. F. R. Co. v. Moore*, 98 Tex. 302.

83 S. W. 362, 4 A. & E. Ann. Cas. 770. In passing, I will call attention to the fact that, as said in *Camors-McConnell Co. v. McConnell*, 140 Fed. 414: "A contract may affect interstate commerce in a variety of ways," not direct, but merely incidental, when the rule of exclusive jurisdiction would not apply. *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

Again, it may be stated that where exclusive jurisdiction is granted to State courts by State legislation, it does not affect the jurisdiction of the Federal courts to deal with the same subject-matter and apply the remedies given by the State. *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945.

## CHAPTER VIII.

### LIMITS OF TERRITORIAL JURISDICTION.

In chapter XV. I discuss in detail the territorial jurisdiction of the Federal courts, but in order to get a complete view of the jurisdictional act, it is necessary here to state that portion of it that defines the jurisdiction of the circuit courts with reference to their territorial limits, together with other existing statutes more or less affecting the provision.

The act of 1888 declares that no civil suit shall be brought before either the district or circuit courts of the United States, against any person by any original process or proceeding, *in any other district* than that where he is an inhabitant, but when the jurisdiction is founded only on the fact that the action is brought between citizens of different States, suit shall be brought only in the district of the residence of *plaintiff* or *defendant*.

Section 740 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 587, provides that when a State contains more than one Federal district, every suit not of a local nature against a single defendant must be brought in the district in which he resides, but if there are two or more defendants residing in different districts of the State, you may bring the suit in either, and a duplicate writ may be directed to the marshal of the other district for service.

Section 741, U. S. Rev. Stat., provides that in suits of a local nature at law or in equity, where the land or other subject-matter of a fixed character lies partly in one and partly in another district within the same State, you may sue in either district where the land lies. It has been contended that section 740 has been repealed by the act of 1888, but this will be discussed hereafter.

Section 8 of the jurisdictional act of 1875, which is specially retained in the act of 1888, provides that where in any suit commenced in any circuit court of the United States, to *enforce*

any legal or equitable lien upon, or *claim to*, or remove any *encumbrance* or *lien* or *cloud* upon real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found in the district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur by a certain day to be designated by the court, which order shall be served on such absent defendant or defendants, if practical, wherever found, and also on the person or persons in possession, or in charge of said property, if any. Or when such personal service on the absent person or persons defendants cannot be had, or is not practicable, such order shall be published once a week for six consecutive weeks in such manner as the court directs. With this grouping of the statutes affecting the general and territorial jurisdiction of the circuit courts, and asking you to again remember that these courts have no jurisdiction other than given in these statutes,—they having no common-law jurisdiction as incident to their creation by Congress,—I will proceed to discuss the several features of the act of 1888 essential to your right to go into a Federal court of equity, and which must appear upon the face of your bill, to wit:

First. Diversity of citizenship.

Second. A Federal question.

Third. Amount necessary to jurisdiction.

Fourth. Territorial jurisdiction.

In discussing these features of jurisdiction, you must keep in mind, as before said, that Federal courts possess no powers except such as the Constitution and statutes of Congress concur in conferring, and the presumption is against jurisdiction unless it affirmatively appears. *United States v. Southern P. R. Co.* 49 Fed. 297; *Re Barry*, 42 Fed. 113; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

## CHAPTER IX.

### DIVERSITY OF CITIZENSHIP.

The language of the act, as we have seen, provides substantially that when the matter in dispute exceeds in amount or value the sum of two thousand dollars, and the controversy is *between citizens of different States*, \* \* \* and when suit is dependent on diversity of citizenship only, that it must be brought against the defendant in the district of the residence of plaintiff or defendant. (See appendix for act.)

Citizenship, so far as the jurisdictional act is concerned, must be that kind that identifies itself with a particular state, and bona fide. *Marks v. Marks*, 75 Fed. 324; *Southern Realty Invest. Co. v. Walker*, 211 U. S. 603, 53 L. ed. 346, 29 Sup. Ct. Rep. 211; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Meyers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 698; *Morris v. Gilmer*, 129 U. S. 329, 32 L. ed. 695, 9 Sup. Ct. Rep. 289; *Kingman v. Holthaus*, 59 Fed. 316; *Mitchell v. United States*, 21 Wall. 352, 353, 22 L. ed. 587, 588; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935.

The 14th Amendment definition of citizenship does not affect the jurisdictional rule. *Nichols v. Nichols*, 92 Fed. 1, 2; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449. However, in *Clausen v. American Ice Co.* 144 Fed. 723, it is said that an allegation in a bill that plaintiff is a citizen of the United States and a resident of a certain State is sufficient under the 14th Amendment to the Constitution, the language of the Amendment being: "All persons born or naturalized in the United States and subject to the jurisdiction thereof." It is not affected by U. S. Rev. Stat. sec. 1992, U. S. Comp. Stat. 1901, p. 1268, defining citizenship "as all persons born in the United States and not subject to any foreign power, excluding Indians." This question will be fully discussed under "Issue of Citizenship and How Proved," so I pass on.



Diversity of citizenship as a basis of jurisdiction must appear in the statement of the bill in equity, setting forth parties and citizenship; and it must appear that every party on one side of the controversy is a citizen of a different State from every party on the other side. *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Wolfe v. Hartford Life & Annuity Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Wilson v. Oswego Twp.* 151 U. S. 63, 64, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; *Timmons v. Elyton Land Co.* 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Horne v. George H. Hammond Co.* 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 163; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Re Stutsman County*, 88 Fed. 337; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 628. And if there be two causes of action, diversity must appear in both. *King v. Inlander*, 133 Fed. 416. See *Howe & D. Co. v. Haugan*, 140 Fed. 184, 185.

Under the present act it matters not how numerous the parties may be; if there are parties from the same State on each side of the controversy, jurisdiction is lost, provided they be indispensable parties, as we shall hereafter see. *Gage v. Riverside Trust Co.* 156 Fed. 1007; *Tracy v. Morel*, 88 Fed. 801; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 368-386, 38 L. ed. 195-204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Anderson v. Bassman*, 140 Fed. 10, 11; *Peninsular Iron Co. v. Stone*, 121 U. S. 633, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; *Raphael v. Trask*, 118 Fed. 777; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 324; *Pittsburgh C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 712; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 163 and authorities cited. Even though a disclaimer be filed, if not dismissed. *Wetherby v. Stinson*, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 175, 176.

To illustrate: In *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 163, 37 L. ed. 1038, 14 Sup. Ct. S. Eq.—4.

Rep. 66, a corporation in Kentucky sued in the courts of Tennessee citizens of Tennessee, and joined a Kentucky corporation. Held, court had no jurisdiction, as the case presents citizens of the same State on both sides. The court further remarked that if the parties plaintiff and defendant are not citizens of different States, there is an entire want of jurisdiction, which cannot be waived by silence or otherwise. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

In *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 711, a Maryland and Ohio corporation sued an Ohio corporation in Ohio. The arrangement deprived the Federal court of Ohio of jurisdiction. *Central Trust Co. v. Virginia T. & C. Steel & I. Co.* 55 Fed. 774.

To show the changes that have been made, and for the better understanding of the decisions, I will state that under the act of 1789, chap. 20, sec. 11, the jurisdiction was only between a citizen of a State *where suit was brought* and citizens of other States. *Brooks v. Bailey*, 20 Blatchf. 85, 9 Fed. 438.

Under the act of 1875 it was decided that all that was necessary was a *diversity*, and not that either party must necessarily be a citizen of the State where suit was brought. *Eureka Consol. Min. Co. v. Richmond Consol. Min. Co.* 2 Fed. 830.

Under the act of 1888 one party must be a citizen of the State where suit is brought.

This brings us to the rule that a citizen of one State cannot sue a citizen of another State in a third State. *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 602 and authorities cited; *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 271; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Shaw v. Quincy Min. Co.* supra; *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.* 108 Fed. 453; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303.

Thus, a corporation incorporated in one State, and having a usual place of business in another State, where sued, cannot be

sued there by a citizen of a different State. *Shaw v. Quincy Min. Co.* supra.

Again, citizens of the same State cannot sue each other in the Federal courts of another State. *Wetherby v. Stinson*, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 173; *Excelsior Pebble Phosphate Co. v. Brown*, supra; *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 820; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* supra. However the right to raise the jurisdictional question is a privilege personal to the party being sued out of his State and cannot be made by codefendants. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286; *Jewett v. Bradford Sav. Bank & T. Co.* 45 Fed. 801; *Schiffer v. Anderson*, 76 C. C. A. 667, 146 Fed. 457; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 131, 35 L. ed. 661, 11 Sup. Ct. Rep. 982; *Smith v. Atchison, T. & S. F. R. Co.* 64 Fed. 1.

To illustrate: Citizens of Texas sued citizens of Alabama in Alabama, and joined Texas citizens as defendants; in this case the court struck out the Texas citizens. *Tug River Coal & Salt Co. v. Brigel*, supra.

As to the application of the rule to removals, see "Removals."

The foregoing cases clearly show that the test rule of jurisdiction based on diversity of citizenship is as follows: In arranging your parties to the bill, it must appear that each plaintiff is competent to sue, and each defendant liable to be sued, in the State and in *the Federal court* in which suit is brought. *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 628; *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 324; *Blunt v. Southern R. Co.* 155 Fed. 500; *Anderson v. Bassman*, 140 Fed. 11; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 5; *Hooe v. Jamison*, 166 U. S. 397, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 174, 175, 20 L. ed. 180, 181; *Sweeney v. Carter Oil Co.* 199 U. S. 257, 50 L. ed. 180, 26 Sup. Ct. Rep. 55; *J. S. Appel Suit & Cloak Co. v. Baggott*, 132 Fed. 1006.

This means that where there is more than one plaintiff, or more than one defendant, in *personal actions*, suit must be brought in the *State* and *district* in which all the plaintiffs were inhabitants, if brought in plaintiffs' residence district, or where all the defendants were inhabitants, if brought in defendants' residence district. *Ames v. Holderbaum*, 42 Fed. 342; *Lancaster v. Asheville Street R. Co.* 90 Fed. 129; *Tice v. Hurley*, 145 Fed. 391; *Schultz v. Highland Gold Mines Co.* 158 Fed. 341; *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; *United States use of Brady v. O'Brien*, 120 Fed. 448; *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 902; *Jenkins v. York Cliffs Imp. Co.* 110 Fed. 809; *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; *Interior Constr. Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 76; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 771, 772; *Freeman v. American Surety Co.* 116 Fed. 550. That is, parties from different States may sue a defendant or defendants where all the defendants reside in the same district, or parties plaintiff all residing in the same district may join several defendants, citizens of different States. *Sweeney v. Carter Oil Co.* 199 U. S. 252, 50 L. ed. 178, 26 Sup. Ct. Rep. 55.

In *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303, a resident of St. Louis, Missouri, together with a citizen of Arkansas, sued in the eastern district of Missouri one O. T. Lyon, a citizen of Texas, in a personal action. The defendant moved to dismiss the case, because a citizen of Arkansas was improperly joined as plaintiff with a citizen of Missouri, and as between the Arkansas plaintiff and the Texas defendant the suit was not brought in the State or district of the residence of plaintiff or defendant. *Ibid.*; *Empire Min. Co. v. Propeller Tow-Boat Co.* *supra*. The court dismissed the case. While the suit showed different citizenship on both sides, and would have been well brought had the resident of St. Louis sued alone in his own district, yet the statute makes no provision for two or more plaintiffs from different States suing a defendant in a third State, but it is required that the plaintiffs must be inhabitants of the same district to sue a

defendant from another State in plaintiff's district. Sewing Mach. Co.'s Case (Grover & B. Sewing-Mach. Co. v. Florence Sewing-Mach. Co.) 18 Wall. 575, 21 L. ed. 918. See authorities above stated; Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 174, 175, 20 L. ed. 180, 181; Greeley v. Lowe, 155 U. S. 68, 69, 39 L. ed. 73, 74, 15 Sup. Ct. Rep. 24; Freeman v. American Surety Co. supra. The rule is adhered to that each plaintiff must be competent to sue, and each defendant liable to be sued, in the court in which the suit is brought, and clearly a citizen of one State cannot sue a citizen of another State in the Federal court of a third State. Empire Min. Co. v. Propeller Tow-Boat Co. supra; and authorities above cited.

We have, then, the rule that a citizen and nonresident cannot sue a nonresident in the citizen's district. Smith v. Lyon, 38 Fed. 53. Thus, a citizen of Texas and a citizen of Missouri cannot join in a suit in Texas against a citizen of Kansas. Smith v. Lyon, 38 Fed. 54; Excelsior Pebble Phosphate Co. v. Brown, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 325; Dominion Nat. Bank v. Olympia Cotton Mills, 128 Fed. 182; Mirabile Corp. v. Purvis, 143 Fed. 920; Moffat v. Soley, 2 Paine, 103, Fed. Cas. No. 9,688; Lochhart v. Horn, 1 Woods, 628, Fed. Cas. No. 8,445; Searles v. Jacksonville, P. & M. R. Co. 2 Woods, 621, Fed. Cas. No. 12,586; Tuckerman v. Bigelow, Brunner, Col. Cas. 631, Fed. Cas. No. 14,228; Shute v. Davis, Pet. C. C. 431, Fed. Cas. No. 12,828.

The rule in Smith v. Lyon, supra, presents a case where plaintiffs were improperly joined, but the rule is equally applicable to defendants. Freeman v. American Surety Co. supra; Bensinger Self-Adding Cash Register Co. v. National Cash Register Co. 42 Fed. 81.

Thus citizens of Pennsylvania sued a corporation of West Virginia in the State and residence district of defendant, but joined a New York corporation as defendants. The court struck out the New York corporation, under the rule as stated. Excelsior Pebble Phosphate Co. v. Brown, supra. The same rule was applied in Ames v. Holderbaum, 42 Fed. 341, where a citizen of Illinois sued a citizen of Iowa in Iowa, but joined as defendants citizens of Ohio.

This rule that each of the plaintiffs must be competent to

sue, and each defendant liable to be sued, in the State and in the court in which suit is brought, does not apply to foreclosing liens (*Lancaster v. Asheville Street R. Co.* 90 Fed. 129, and authorities cited), nor in local actions as will appear hereafter, for these character of suits are controlled in the first instance by section 8 of the jurisdictional act of 1875, and in second instance by sections 740 and 741 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 587, 588). The rule as stated above only applies to personal suits. *Dick v. Foraker*, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; *Single v. Scott Paper Mfg. Co.* 55 Fed. 555; *Ames v. Holderbaum*, supra.

### *Word "Citizen" Used Collectively.*

The foregoing cases show that the word "citizen," used in the statute, is used collectively, and means all citizens on one side of a suit; and the same construction is given to the word "inhabitant," as used in the act of 1888. *Greeley v. Lowe*, supra; *Smith v. Lyon*, 133 U. S. 318, 33 L. ed. 636, 10 Sup. Ct. Rep. 303; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 531.

### *Citizenship of Representative Parties.*

In determining the diversity of citizenship, the citizenship of representatives of parties becomes material, and the general rule may be stated that, where the suit is brought in the name of one who acts in a representative capacity, such as executor, administrator, receiver, or trustee, it is the citizenship of the representative party that controls the jurisdiction, and not that of the beneficiary. *New Orleans v. Gaines* (*New Orleans v. Whitney*) 138 U. S. 606, 34 L. ed. 1106, 11 Sup. Ct. Rep. 428; *Bangs v. Loveridge*, 60 Fed. 965; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Knapp v. Troy & B. R. Co.* 20 Wall. 124, 22 L. ed. 331. (See authorities cited below.) Thus the citizenship of a trustee controls. *Hunter v. Robbins*, 117 Fed. 922; *Johnson v. St. Louis*, 96 C. C. A. 617, 172 Fed. 32, 40, 41; *Knapp v.*

Troy & B. R. Co. 20 Wall. 117, 22 L. ed. 328; Susquehanna & W. Valley R. & Coal Co. v. Blatchford, 11 Wall. 172-177, 20 L. ed. 179-181; Shipp v. Williams, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 6; Shirk v. La Fayette, 52 Fed. 858; Griswold v. Batcheller, 75 Fed. 473. See Smith v. Rackliffe, 87 Fed. 968, as to citizenship of a receiver.

### *Exceptions to Rule.*

However, there may be an exception to this rule where the trustee is a naked trustee, simply to hold the property, with no power over it and no right or duty to foreclose was given. D. A. Tompkins v. Catawba Mills, 82 Fed. 780-784. Where a trustee of a nonresident *cestui que trust* refuses to sue, the nonresident beneficiary may sue in the Federal court (Bowdoin College v. Merritt, 63 Fed. 213), unless the refusal was collusive. (Detroit v. Dean, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; Cilley v. Patten, 62 Fed. 500; See Shipp v. Williams, *supra*. See Einstein v. Georgia S. & F. R. Co. 120 Fed. 1009). In Einstein v. Georgia S. & F. R. Co. 120 Fed. 1008, one of three trustees refusing to sue was made defendant; this trustee was a citizen of the State of the Corporation defendant; it was held the Federal court had jurisdiction, citing Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917. So, where the interest of the nonresident beneficiary is prosecuted in hostility to the trustees. Reinach v. Atlantic & G. W. R. Co. 58 Fed. 38. Where the action relates only to the title or possession of the trust property, and the relation of the trustee to the beneficiary is not involved, the citizenship of the trustee controls; otherwise the citizenship of the *cestui que trust* may affect the jurisdiction. Griswold v. Batcheller, 75 Fed. 473; Carey v. Brown, 92 U. S. 172, 23 L. ed. 469; see Stout v. Rigney, 46 C. C. A. 459, 107 Fed. 545.

The citizenship of a guardian controls jurisdiction. Pennington v. Smith, 24 C. C. A. 145, 45 U. S. App. 409, 78 Fed. 409; Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 48; See Stout v. Rigney, *supra*; Mexican R. Co. v. Eckman, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211.

So, also, the citizenship of administrators and executors.

Continental L. Ins. Co. v. Rhoads, 119 U. S. 240, 30 L. ed. 381, 7 Sup. Ct. Rep. 193; McDuffie v. Montgomery, 128 Fed. 107; Rice v. Houston, 13 Wall. 66, 20 L. ed. 484; New Orleans v. Gaines (New Orleans v. Whitney), 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; De Forest v. Thompson, 40 Fed. 375; Harper v. Norfolk & W. R. Co. 36 Fed. 103; Bangs v. Loveridge, 60 Fed. 963; Bishop v. Boston & M. R. Co. 117 Fed. 771; Monmouth Invest. Co. v. Means, 80 C. C. A. 527, 151 Fed. 160; Wilson v. Hastings Lumber Co. 103 Fed. 801. See Schneider v. Eldredge, 125 Fed. 640; Rice v. Houston, 13 Wall. 67, 20 L. ed. 484.

So it may be stated generally that persons subrogated to the rights of others control jurisdiction by their own citizenship. Subrogation is not assignment. New Orleans v. Gaines (New Orleans v. Whitney), 138 U. S. 606, 34 L. ed. 1106, 11 Sup. Ct. Rep. 428.

### *By Next Friend.*

A distinction exception to the rule that the citizenship of the representative determines jurisdiction arises in suits in behalf of infants by next friend. In such cases the citizenship of the infant controls. Blumenthal v. Craig, 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320; Woolridge v. M'Kenna, 8 Fed. 668; Voss v. Neineber, 68 Fed. 947; Dodd v. Ghiselin, 27 Fed. 405; Wiggins v. Bethune, 29 Fed. 51. The domicile of the infant is that of its parents; if the father be living, that of the father; if dead, that of the mother. Marks v. Marks, 75 Fed. 325. Where the parents are divorced the domicile will be governed by the domicile of the parent to whom the infant has been awarded. Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 49.

### *For the Use of.*

Another exception arises when suit is brought for the use of another; then the citizenship of the beneficiary controls.



## CHAPTER X.

### EFFECT OF CHANGE OF CITIZENSHIP PENDING SUIT.

It has already been stated that the jurisdiction is determined by the status of the parties when begun. The uniform rule has been that no change of residence after suit begun will affect the jurisdiction; and this rule applies to either party. *Anderson v. Watt*, 138 U. S. 702, 34 L. ed. 1081, 11 Sup. Ct. Rep. 449; *Brigel v. Tug River Coal & Salt Co.* 73 Fed. 13-17, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Ritchie v. Burke*, 109 Fed. 19; *Collins v. Ashland*, 112 Fed. 175; *Jarboe v. Templer*, 38 Fed. 217; *Cross v. Evans*, 29 C. C. A. 523, 52 U. S. App. 720, 86 Fed. 4, 5; *Louisville N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 566, 43 L. ed. 1088, 19 Sup. Ct. Rep. 817. Nor will any change by assignment of the cause of action, pending the suit, whereby the parties in interest become citizens of the same State; nor will any change of parties holding in a fiduciary capacity in any way affect the jurisdiction of the court once obtained. *Ibid.*; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; *Jarboe v. Templer*, *supra*.

To illustrate: If you sue the tenant in possession and have thereby proper diversity, the bringing in of the landlord into the suit by the tenant will not affect jurisdiction, though the landlord be a citizen of the same State with the plaintiff. *Phelps v. Oaks*, 117 U. S. 239, 29 L. ed. 889, 6 Sup. Ct. Rep. 714; *Hardenbergh v. Ray*, 151 U. S. 118, 38 L. ed. 94, 14 Sup. Ct. Rep. 305; *Sioux City Terminal R. & Warehouse Co. v. Insurance Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Park v. New York, L. E. & W. R. Co.* 70 Fed. 641; *Stewart v. Dunham*, 115 U. S. 64, 29 L. ed. 330, 5 Sup.

Ct. Rep. 1163; *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 736.

But sometimes one changes his citizenship before suit in order to bring his case within Federal jurisdiction. It is now a fixed rule that this can be done if the change is bona fide, though the purpose may be to bring a suit in the Federal court. The change must be bona fide, that is, with the *animo manendi*, and not merely ostensible. *Mitchell v. United States*, 21 Wall. 352, 353, 22 L. ed. 587, 588. In *Jones v. League*, 18 How. 76, 15 L. ed. 263, plaintiff removed from Texas to Maryland, and brought suit against citizens of Texas in a Federal court in that State. The case was reversed because it appeared that the removal was not with the bona fide intent of becoming a permanent citizen of Maryland; and, again, it appeared that the deed to plaintiff by one Power was only colorable, as it was in pursuance of a scheme not to pass the title, but give the plaintiff the right to sue in Texas for the benefit of Power, a citizen of Texas. *Marks v. Marks*, 75 Fed. 325. In *Kingman v. Holthaus*, 59 Fed. 316, where the plaintiff rented a room in an adjoining State, without changing his place of business or eating house, the suit was dismissed. *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 780, and authorities cited.

So again in *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289, it appearing that plaintiff removed to Tennessee to obtain jurisdiction in a Federal court in Alabama, and with no purpose to acquire a settled home, the case was dismissed, but on page 328 the court says: That a citizen of a State can change his citizenship to another, and sue in a Federal court, though his purpose in changing his domicile was to invoke Federal jurisdiction. If this new citizenship is really and truly acquired his right is a constitutional one. *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780; *Jones v. League*, 18 How. 81, 15 L. ed. 264; *Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289. In a word, the motive will not be considered if the change be real. *Wiemer v. Louisville Water Co.* 130 Fed. 244. The rule as above stated cannot be misunderstood, and, while the authorities are abundant, it is not deemed necessary to make further reference to them.

*Transfer of Property to Create Diversity.*

Federal cognizance of prospective litigation is often sought by transferring to a nonresident the subject of litigation or cause of action. To make such transfers effective for the purpose the same test as applied in change of citizenship is here applied,—that is, good faith in the transfer. The rule is that the transfer must be genuine, and bona fide, the title must in good faith pass to the nonresident. There must be no reservation of any right, title, or interest in the property transferred, nor must there be any secret purpose that after the litigation the property or any interest therein is to be restored to the resident grantee by repurchase or otherwise. As stated in change of citizenship, motive is not considered if the transfer be bona fide and without secret reservation.

In *Crawford v. Neal*, 144 U. S. 593, 36 L. ed. 556, 12 Sup. Ct. Rep. 759, it is said, if the transfer was fictitious to make the nonresident a nominal or colorable party, then there is no jurisdiction, but when all interest in the subject-matter is parted with upon good consideration, then the fact that the motive was to get Federal jurisdiction will not be considered. *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 282; *Alkire Grocery Co. v. Richesin*, 91 Fed. 84; *Lake County v. Dudley*, 173 U. S. 251, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; *Irvine Co. v. Bond*, 74 Fed. 849; *Norton v. European & N. A. R. Co.* 32 Fed. 875; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 1; *Ashley v. Presque Isle County*, 27 C. C. A. 585, 54 U. S. App. 450, 83 Fed. 534; *Lake County v. Schradsky*, 38 C. C. A. 17, 97 Fed. 2; *Hayden v. Manning*, 106 U. S. 589, 27 L. ed. 307, 1 Sup. Ct. Rep. 617.

In *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67, it was held that the transfer of an overdue note and mortgage to get Federal jurisdiction was not collusive. A transfer made for the sole purpose of conferring jurisdiction is collusive. *Ibid.*; *Bernards Twp. v. Stebbins*, 109 U. S. 355, 27 L. ed. 961, 3 Sup. Ct. Rep. 252; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Marvin v. Ellis*, 9 Fed. 367; *Coffin v. Haggin*, 7 Sawy. 509, 11 Fed. 224.

Persons cannot by stratagem and device impose upon the jurisdiction of the Federal court, and when it appears from the evidence that the jurisdiction has been imposed upon, the court under the fifth section of the act of March, 1875, must dismiss the suit. *Ibid.*; *Fountain v. Angelica*, 20 Blatchf. 448, 12 Fed. 8; *Greenvalt v. Tucker*, 3 McCrary, 450, 10 Fed. 884; *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649.

### *Suit by Assignees.*

Section 11 of the act of 1789, amended and somewhat changed by the act of 1888, limits the jurisdiction of the Federal courts in suits by assignees of promissory notes and other choses in action, which will be discussed hereafter.

See New Code, chap. 2, sec. 24.

### *Who Are Not Citizens Within the Meaning of the Act.*

A State is not a citizen, therefore a State cannot sue in Federal courts on ground of diversity of citizenship, but it may sue where the basis of jurisdiction is a Federal question. *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 872; *Postal Teleg. Cable Co v. United States* (*Postal Teleg. Cable Co. v. Alabama*), 155 U. S. 487, 39 L. ed. 232, 15 Sup. Ct. Rep. 192; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 353; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Oregon v. Three Sisters Irrig. Co.* 158 Fed. 349; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260; *Minnesota v. Guaranty Trust & S. D. Co.* 73 Fed. 914. Nor has the Federal court jurisdiction when a State sues its own or citizens of another State. *Kentucky v. Chicago, I. & L. R. Co.* 123 Fed. 457. Where a State gives consent to its own citizens to sue it, the suit cannot be carried into the Federal court, though there be a Federal question; however, this would not prevent a writ of error to the Supreme Court of the United States if the decision of the court of last resort be against the right claimed by virtue of a Federal law. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; *Hans v. Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; *North*

Carolina v. Temple, 134 U. S. 30, 33 L. ed. 852, 10 Sup. Ct. Rep. 509.

The citizens of the District of Columbia and the Territories are not citizens of States within the meaning of the Federal judiciary act. *Maxwell v. Federal Gold & Copper Co.* 83 C. C. A. 570, 155 Fed. 110; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157; *McClelland v. McKane*, 154 Fed. 164, 165; *Weller v. Hanaur*, 105 Fed. 193; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 108, 36 Fed. 8; *Johnson v. Bunker Hill & S. M. & C. Co.* 46 Fed. 417; *Hooe v. Jamieson*, 166 U. S. 397, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596. See *Koenigsburger v. Richmond Silver Min. Co.* 158 U. S. 50, 39 L. ed. 892, 15 Sup. Ct. Rep. 751.

You cannot join a citizen of a State with a citizen of a Territory. *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157. As to citizens of Porto Rico, see *Re Gonzalez*, 118 Fed. 941, S. C. 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177.

## CHAPTER XI.

### SHIFTING PARTIES TO CREATE DIVERSITY.

Having stated the general rules of jurisdiction dependent on diversity of citizenship, which should appear in a bill in equity, I will now speak of a condition of case when the circuit court will take jurisdiction, though a diversity of citizenship does not appear in the bill.

Prior to the act of 1875 the pleadings only were looked to to determine the diversity of citizenship, and the position of parties on the record was conclusive. *Bland v. Fleeman*, 29 Fed. 672.

Since the act of 1875 the courts will not, in order to retain jurisdiction on the ground of diversity of citizenship, be bound by the position of parties in the bill, but will shift them, if their interests will permit, and so arrange them as to fall within the rule of jurisdiction, that all parties plaintiff will be of a different citizenship from all parties defendant. *Stephens v. Smartt*, 172 Fed. 471, and authorities cited; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Steele v. Culver*, 211 U. S. 26, 53 L. ed. 74, 29 Sup. Ct. Rep. 9; *Evers v. Watson*, 156 U. S. 532, 39 L. ed. 522, 15 Sup. Ct. Rep. 430; *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420; *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; *Anderson v. Watt*, 138 U. S. 701, 34 L. ed. 1080, 11 Sup. Ct. Rep. 449.

To this end, the court must determine; First, whether the parties from the same State on either side are indispensable; if not, it will dismiss them to create the necessary diversity. *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 694. Second, if they cannot thus be dismissed, then the court determines their relation to the subject-matter, and if their position can be shifted so as to create diversity and still protect their rights,

it will do so and take jurisdiction; if this cannot be done, the case must be dismissed. In determining their relation to the subject-matter, the court cannot divide indispensable parties having identical interests, as will be hereafter seen.

By shifting the parties is meant that parties defendant may be made parties plaintiff, which can often be done and their rights as well protected as if they had remained defendants. In the same way parties plaintiff may be shifted to the defendant side. Equity rule 540. That is, parties may be arranged according to their actual interest in the controversy, and the court retain jurisdiction. Act 1888, section 5. *Cilley v. Patten*, 62 Fed. 498-500; *Oberlin College v. Blair*, 70 Fed. 417; *Blake v. McKim*, 103 U. S. 336, 26 L. ed. 563; *Harter Twp. v. Kernochan*, 103 U. S. 566, 567, 26 L. ed. 412, 413; *Mangels v. Donau Brewing Co.* 53 Fed. 513; *Claiborne v. Waddell*, 50 Fed. 368; *First Nat. Bank v. Radford Trust Co.* 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 573; *Consolidated Water Co. v. Babcock*, 76 Fed. 248; *Removal Cases*, supra; *Wood v. Deskins*, 72 C. C. A. 558, 141 Fed. 507; *Mann v. Gaddie*, 88 C. C. A. 1, 158 Fed. 43; *Sea Board Air Line R. Co. v. North Carolina R. Co.* 123 Fed. 631. This rule was first applied in construing the second section of the judiciary act of 1875, providing for removal of all suits of a civil nature from State to Federal courts in which there was a controversy between citizens of different States, it being held that for the purposes of removal the matter in dispute may be first ascertained, and the parties arranged with reference to the actual interest, on opposite sides of the dispute, and if in such arrangement it appears that those on one side are of a different citizenship from those on the other, the cause could be removed from the State to the Federal court. Acts 1875 and 1888, section 2; *Removal Cases* and *Consolidated Water Co. v. Babcock*, supra; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 531; *Evers v. Watson*, supra; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932; *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 709. Although this section, as will be seen by reference to the statute, related to removals from State to Federal courts, it was soon applied to suits originally brought in the circuit courts. *Ibid.*; *Pacific R. Co. v. Ketchum*, 101 U. S. 298, 25 L. ed.

936; Oberlin College v. Blair, *supra*; Ayres v. Wiswall, 112 U. S. 192, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; Dormitzer v. Illinois & St. L. Bridge Co. 6 Fed. 217; Covert v. Waldron, 33 Fed. 312; Shipp v. Williams, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 7. It is thus seen that the construction given to the statute removes the jurisdiction by diversity of citizenship from dependence on the arbitrary and capricious arrangement of the pleader, and while often it becomes necessary to join as defendants those who are unwilling to become plaintiffs, yet such arrangement does not bind the court, if it becomes necessary to change them, in order to remove a case to the Federal court, or retain jurisdiction when originally filed. Again, an improper joinder of parties that may defeat jurisdiction will not be permitted. Horn v. Lockhart, 17 Wall. 579, 21 L. ed. 660; Snow v. Smith, 88 Fed. 657; Mason v. Dullagham, 27 C. C. A. 296, 53 U. S. App. 539, 82 Fed. 689.

### *Identity of Interests.*

It has been said that you cannot place on both sides of the controversy, in order to retain jurisdiction, indispensable parties having identity of interests. Johnson v. Ford, 109 Fed. 503; Menefee v. Frost, 123 Fed. 633; Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co. 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 705; Joseph Dry Goods Co. v. Hecht, 57 C. C. A. 64, 120 Fed. 761; Carroll v. Chesapeake & O. Coal Agency Co. 61 C. C. A. 49, 124 Fed. 309; Blacklock v. Small, 127 U. S. 96, 32 L. ed. 70, 8 Sup. Ct. Rep. 1096; Mangels v. Donau Brewing Co. 53 Fed. 513; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420. If any of the parties plaintiff have the same interest with any of the parties defendant, and the interest is not separable, as will be hereafter explained, you cannot separate them because they are citizens of different States, in order to get jurisdiction by diversity. Thus a beneficiary, a citizen of one State, suing a mortgagor, who is a citizen of another State, in a Federal court in the former State to foreclose a trust deed or mortgage, naming a trustee who is a citizen of the latter State also, cannot make the trustee a party



defendant so as to have diversity, where there is no antagonism or no relief asked against the trustee, because, so far as the foreclosure is concerned, the interests of the beneficiary and trustee are identical. *Ibid.*; *Boston Safe Deposit & T. Co. v. Racine*, 97 Fed. 817; *Old Colony Trust Co. v. Atlanta R. Co.* 100 Fed. 798; *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; *Gage v. Riverside Trust Co.* 156 Fed. 1003; *Redfield v. Baltimore & O. R. Co.* 124 Fed. 929; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119-122, and authorities cited. See *Gaddie v. Mann*, 147 Fed. 966. So, if the trustee and beneficiary be of the same State, and the trustee is made a party defendant with the mortgagor, who is a nonresident, the court will remove the cause and treat the trustee as plaintiff with the beneficiary. If a trustee is a citizen of a State other than the State in which the suit is brought, or, as said in *Shipp v. Williams*, 10 C. C. A. 247, 22 U. S. App. 380, 62 Fed. 5, if he is qualified by his citizenship to sue in a Federal court, then the citizenship of the beneficiary under the trust is wholly unimportant. But if the trustee is disqualified by being a citizen of the same State with the defendants, a suit cannot be entertained, even though the beneficiary be a nonresident. The rule would not be changed by reason of the refusal of the trustee to act. 10 C. C. A. 248. *Gardner v. Brown*, 21 Wall. 36, 22 L. ed. 527; *Caylor v. Cooper*, 165 Fed. 758; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Redfield v. Baltimore & O. R. Co.* 124 Fed. 929; *Menefee v. Frost*, 123 Fed. 633; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 122 Fed. 922; *Rust v. Brittle Silver Co.* 7 C. C. A. 389, 19 U. S. App. 237, 58 Fed. 611. See *Bowdoin College v. Merritt*, 63 Fed. 213.

Again, the rule may be illustrated by cases where the interests of heirs are identical: You cannot, because of their diverse citizenship, place them on both sides of a suit in order to settle an administration of the estate. *Bland v. Fleeman*, 29 Fed. 671; *Cilley v. Patten*, 62 Fed. 500; *Oberlin College v. Blair*, 70 Fed. 414. So in partition, you cannot shift parties to obtain jurisdiction. *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 279; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726. Nor where there are two executors, one of whom

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is a citizen of the same State with defendants. See *Anderson v. Watt*, 138 U. S. 694, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449.

In *Smith v. Consumers' Cotton Oil Co.* 30 C. C. A. 103, 52 U. S. App. 603, 86 Fed. 359, it was held that you could dismiss as to one member of a firm from a State with plaintiff in order to retain jurisdiction. This was a suit in which a citizen of Illinois sued the members of a Texas firm, one of whom was a citizen of Illinois, on a breach of contract. The court permitted the Illinois member to be dismissed from the suit in order to retain jurisdiction. But in *Ruble v. Hyde*, 1 *McCrary*, 513, 3 Fed. 331, a partnership of Minnesota sued in Minnesota seven persons as copartners, one of whom was a citizen of Minnesota. The suit was in the State court; the cause was removed by the six nonresident defendants to the Federal court. On a motion to remand, the court granted it, because the Minnesota member of the firm was not a nominal party, and being a citizen of the same State with plaintiff, the court could not take jurisdiction. *Hyde v. Ruble*, 104 U. S. 407, 26 L. ed. 823. It will be seen that the case of *Ruble v. Hyde*, *supra*, was not referred to in *Smith v. Consumers' Cotton Oil Co.* It was evidently overlooked, or we should not have had a different conclusion upon similar facts, in determining so important a question of jurisdiction.

## CHAPTER XII.

### SEPARABLE CONTROVERSY.

As to what is a separable interest which may control the jurisdiction of the Federal courts, and by which diversity of citizenship may be created, is indicated in the latter clause of section 2 of the act of 1875, and amended in section 2 of the judiciary act of 1888, which is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove such suit into the circuit court of the United States."

In the act of 1875 either the plaintiff or defendant could remove the case into the Federal court, but at present, under the act of 1888, only a nonresident defendant or defendants can remove the case from the State court.

This clause of section 2 has been frequently construed and applied to suits originally filed in the Federal courts, and the principle fixed, that if the interest of the party whose situation as to residence or citizenship would defeat jurisdiction, is a *separable* interest, and the matters involved in the bill can be wholly determined between the parties properly before the court, without materially affecting the party holding the separable interest, then the court will dismiss the party holding the separable interest and retain jurisdiction. *Geer v. Mathieson Alkali Works*, 190 U. S. 432, 47 L. ed. 1124, 23 Sup. Ct. Rep. 807; *Smedley v. Smedley*, 110 Fed. 258; *Torrence v. Shedd*, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; *Chicago, R. I. & P. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 455; *Stanbrough v. Cook*, 3 L.R.A. 400, 38 Fed. 372, 373; *Hyde v. Ruble*, 104 U. S. 409, 26 L. ed. 823;

Western U. Teleg. Co. v. Brown, 32 Fed. 339; Barney v. Latham, 103 U. S. 205, 26 L. ed. 514.

But the question is, what is the test of this separable interest that will authorize a dismissal of a party to sustain diversity of citizenship? It must appear that a complete decree can be granted without the presence of the separate interest, and without injury to the party holding it, whose presence would affect the jurisdiction. *Ibid.*; Ayres v. Wiswall, 112 U. S. 192, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; Torrence v. Shedd, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 385, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Hanrick v. Hanrick, 153 U. S. 196, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; Bates v. Carpentier, 98 Fed. 452; Regis v. United Drug Co. 180 Fed. 201. But it is not separable because parties are asking for separate decrees and executions, but what does the whole case show the controversy to be. See *MacGinnis v. Boston & M. Consol. Copper & S. Min. Co.* 55 C. C. A. 648, 119 Fed. 100, 101.

Thus, a case contains a separable controversy when the cause of action sued upon is capable of separation into two or more independent suits, one of which is wholly between citizens of different States; that is, can be fully determined between them without the presence of the other party obnoxious to the Federal jurisdiction. *Barth v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, 60 Fed. 468; *Stanbrough v. Cook*, *supra*; *Fraser v. Jennison*, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171; *Carothers v. McKinley Min. & Smelting Co.* 116 Fed. 951; *Western U. Teleg. Co. v. Brown*, 32 Fed. 341; *Barney v. Latham*, 103 U. S. 212-216, 26 L. ed. 517, 518; *Brown v. Trousdale*, 138 U. S. 396, 34 L. ed. 990, 11 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Farmer*, 23 C. C. A. 574, 36 U. S. App. 771, 47 Fed. 931.

The clear purpose of the clause in the act is to permit a non-resident citizen joined with other defendants in a State court, to remove the case to the Federal court, if as between him and the plaintiff the cause be separable; that is, the issues affecting him can be wholly determined without the presence of the other defendants. Again, it is applied when an original bill is

filed and a party to the bill, whose situation as to residence would defeat the jurisdiction, has a separable interest. In such case the court will dismiss the separable interest to retain jurisdiction. *Ibid*.

This rule is frequently illustrated in suits brought against many defendants to quiet title, where defendants hold under separate deeds (*Bates v. Carpentier*, 98 Fed. 454; *Stanbrough v. Cook*, 3 L.R.A. 400, 38 Fed. 369; *Bacon v. Felt*, 38 Fed. 870), but not under a joint deed, for in this latter case no decree could be rendered without affecting all parties in the deed, which is a test of the separable interest. *Peninsular Co. v. Stone*, 121 U. S. 632, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1010. It seems that there must be neither joint right or liability. *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. 257, 258.

Again, in determining whether there is a separable controversy, you must not be confused by the fact that various defendants may set up various and separate defenses against a single controversy. Such separate defenses, however different, do not constitute the separable interest that must exist as a basis to divide the controversy, and dismissing the party from the suit if joined or omitting him from the bill. *Ayres v. Wiswall*, 112 U. S. 193, 28 L. ed. 695, 5 Sup. Ct. Rep. 90; *Connell v. Smiley*, 156 U. S. 340, 39 L. ed. 444, 15 Sup. Ct. Rep. 353; *Torrence v. Shedd*, 144 U. S. 530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 97, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; *Dougherty v. Yazoo & M. Valley R. Co.* 58 C. C. A. 651, 122 Fed. 205; *Miller v. Clifford*, 5 L.R.A.(N.S.) 49, 67 C. C. A. 52, 133 Fed. 884, and authorities cited; *Colburn v. Hill*, 41 C. C. A. 467, 101 Fed. 505; *Rosenthal v. Coates*, 148 U. S. 142-147, 37 L. ed. 399, 400, 13 Sup. Ct. Rep. 576; *Re Jarnecke Ditch*, 69 Fed. 169; *Graves v. Corbin*, 132 U. S. 588, 33 L. ed. 468, 10 Sup. Ct. Rep. 196. See *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 756, 757. And this test of a separable interest is not affected in equity by State statutes permitting judgment to be taken against one or more of the defendants. *Louisville & N. R. Co. v. Ide*, 114 U. S. 52-57, 29 L. ed. 63-65, 5 Sup. Ct. Rep. 735.

To illustrate: A bill is filed to reach the property of a

partnership and to declare certain encumbrances void. We have in such case only a single controversy, though there are various defendants and various defenses (*Graves v. Corbin*, 132 U. S. 585, 33 L. ed. 467, 10 Sup. Ct. Rep. 196; *Torrence v. Shedd*, 144 U. S. 531, 36 L. ed. 531, 12 Sup. Ct. Rep. 726. See *Brooks v. Clark*, 119 U. S. 511, 30 L. ed. 485, 7 Sup. Ct. Rep. 301), or a creditors' bill to subject encumbered property; the controversy is single, though the defenses are different (*Fidelity Ins. Trust & S. D. Co. v. Huntington*, 117 U. S. 281, 29 L. ed. 899, 6 Sup. Ct. Rep. 733; *Rosenthal v. Coates*, 148 U. S. 147, 37 L. ed. 400, 13 Sup. Ct. Rep. 576; *Thurber v. Miller*, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 374; *Colburn v. Hill*, *supra*), for the plaintiff seeks a complete decree to subject the property to sale free from any encumbrance. *Ibid*.

So in trying title to a tract of land where residents and non-residents are made parties defendant, no separable controversy is presented so that a nonresident may remove the case. *Lomax v. Foster Lumber Co.* 99 C. C. A. 463, 174 Fed. 959-965. See *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 581-582. Condemnation proceedings. *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 171.

So an action by a citizen of one State against a citizen corporation of same State and nonresidents, to compel corporation to transfer stock, cannot be removed by nonresident on the ground of a severable cause of action. *St. Louis & S. F. R. Co. v. Wilson*, 114 U. S. 62, 29 L. ed. 67, 5 Sup. Ct. Rep. 738.

So in suit to foreclose a mortgage, where mortgagor and mortgagee are residents of same State. *Thompson v. Dixon*, 28 Fed. 6.

So in a creditors' suit to set aside collusive judgments. *Graves v. Corbin*, 132 U. S. 589, 33 L. ed. 468, 10 Sup. Ct. Rep. 196.

So in suit seeking cancelation of bonds. *Wilson v. Oswego Twp.* 151 U. S. 67, 38 L. ed. 75, 14 Sup. Ct. Rep. 259.

So in action for partition. *Torrence v. Shedd*, *supra*.

So in specific performance, where an agent negotiating the sale was a necessary party and of the same citizenship, with

complainant. *Scoutt v. Keck*, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 900.

These cases all illustrate the rule that where the bill discloses but a single cause of action, it is not separable. *McMillan v. Noyes*, 146 Fed. 926; *Reinartson v. Chicago G. W. R. Co.* 174 Fed. 707; *Cleveland v. Cleveland*, C. C. & St. L. R. Co. 77 C. C. A. 467, 147 Fed. 171.

### *Joint and Several Liability.*

Where the liability of two or more is joint and several, and plaintiff elects to sue jointly, a separable interest of one of the defendants cannot be set up to obtain Federal jurisdiction. *Moore v. Los Angeles Iron & Steel Co.* 89 Fed. 78, and authorities cited; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Graves v. City & Suburban Teleg. Asso.* 132 Fed. 389; *Lathrop-Shea & H. Co. v. Pittsburg, S. & M. R. Co.* 135 Fed. 619; *Pirie v. Tvedt*, 115 U. S. 43, 29 L. ed. 332, 5 Sup. Ct. Rep. 1034, 1161; *Brown v. Coxe Bros & Co.* 75 Fed. 689; *Mutual Reserve Fund Life Asso. v. Farmer*, 23 C. C. A. 574, 36 U. S. App. 771, 77 Fed. 929; *Little v. Giles*, 118 U. S. 602, 30 L. ed. 271, 7 Sup. Ct. Rep. 32; *Sexton v. Seelye*, 39 Fed. 705; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 97, 42 L. ed. 674, 18 Sup. Ct. Rep. 264.

So in an action founded in tort, plaintiff may sue one or all the joint tort feasers, but when all are sued there can be no separable controversy with any one defendant so as to give a Federal court jurisdiction (*Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1; *Evans v. Felton*, 96 Fed. 176; *Carr v. Kansas City*, 87 Fed. 1; *Doremus v. Root*, 94 Fed. 760; *Graves v. City & Suburban Teleg. Asso.* 132 Fed. 387; *Keller v. Kansas City, St. L. & C. R. Co.* 135 Fed. 202; *Riser v. Southern R. Co.* 116 Fed. 216; *Fogarty v. Southern P. Co.* 123 Fed. 974, and authorities cited. See *Atlantic & P. R. Co. v. Laird*, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120; *Little v. Giles*, 118 U. S. 600, 30 L. ed. 270, 7 Sup. Ct. Rep. 32; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203), or where the bill is to cancel for fraud (*Oakes v. Yonah Land & Min. Co.* 89 Fed. 243); but in such cases there must be co-operation in fact, or community in wrong

doing. *Mitchell v. Smale*, 140 U. S. 409, 35 L. ed. 443, 11 Sup. Ct. Rep. 819, 840.

Again, where a party sues to recover personal damage against two defendants, one being nonresident, there is no separable controversy, unless it be shown that the home party was joined to oust jurisdiction. *Graves v. City & Suburban Teleg. Asso. supra*. Thus a railroad company and conductor being joined, it being alleged that party was injured by negligence of the conductor to obey rules was held not to be separable. *Riser v. Southern R. Co.* 116 Fed. 215. See *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 139, 45 L. ed. 125, 21 Sup. Ct. Rep. 67; *Weaver v. Northern P. R. Co.* 125 Fed. 155; *Rupp v. Wheeling & L. E. R. Co.* 58 C. C. A. 161, 121 Fed. 825; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637; *Doremus v. Root*, 94 Fed. 760; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286. But in *Deere v. Chicago, M. & St. P. R. Co.* 85 Fed. 876, it is held that motive will not be considered if an interest exists.

Where, however, a statute imposes an obligation on a corporation alone, then it seems that if injury occurs by a breach of the duty thus required by the statute, there can be no joint liability between a corporation and an employee by failure of the company to perform the duty, and such action is separable. *Kelly v. Chicago & A. R. Co. supra*; *Bryce v. Southern R. Co.* 122 Fed. 709; *Williard v. Spartanburg, U. & C. R. Co.* 124 Fed. 801. See *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 87-96; *Jackson v. Chicago, R. I. & P. R. Co.* 102 C. C. A. 159, 178 Fed. 432-435. See *Fogarty v. Southern P. Co.* 123 Fed. 975, as to proper allegations; *Reinartson v. Chicago G. W. R. Co.* 174 Fed. 707.

In *Batey v. Nashville, C. & St. L. R. Co.* 95 Fed. 368, the railroad company and Pullman company were sued, alleging the injury to be caused by negligence in handling the train and against the other for negligence in construction of the berth by which he was thrown out. This was held separable.

While these cases founded upon tort and trespass are purely actions at law, yet they serve to illustrate the principle upon which separable controversies are based. (See "Tort Feasors, Removal by.") *Atlantic & P. R. Co. v. Laird*, 164 U. S. 396, 41 L. ed. 486, 17 Sup. Ct. Rep. 120.



## CHAPTER XIII.

### CITIZENSHIP OF CORPORATIONS.

We have seen that the judicial power of the United States has been declared to extend to controversies between citizens of different States and citizens of a State and aliens, and the words "citizens" and "aliens" have been construed to include corporations.

For fifty years in the judicial history of this country the word "citizen," as used in the Constitution, extending the judicial power of the Federal government to controversies between citizens of different states, was held not to include "corporations." *Hope Ins. Co. v. Beardman*, 5 Cranch, 57-61, 3 L. ed. 36, 37. We find, however, corporations were litigants in these courts from their organization, but in these cases the citizenship of the incorporators was sufficient to create the diversity that gave jurisdiction. *Ibid.*; *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. ed. 435; *Commercial & R. Bank v. Slocumb*, 14 Pet. 60, 10 L. ed. 254. Thus we see the citizenship of the individual stockholders controlled the jurisdiction over corporations when it was dependent on diversity of citizenship, and it was permitted the defendant to raise the issue by alleging and showing the citizenship of any or all of the stockholders composing the corporation, so as to defeat the jurisdiction of the Federal court. This remained the rule until 1844, when the Supreme Court of the United States, in an opinion delivered by Mr. Justice Wayne, held that a corporation was a person, though an artificial one, inhabiting and belonging to the State of its birth (*Louisville, C. & C. R. Co. v. Letson*, 2 How. 555, 11 L. ed. 376); and this, though citizens of other States may be members of the corporation, that for all jurisdictional purposes, that is, to sue or be sued, it is a citizen within the meaning of the Constitution and the judiciary act of 1789. Thus we see that the doctrine of the previous cases was entirely

overthrown, and for ten years acquiesced in as a final settlement of the status of a corporation for judicial purposes.

In 1853 in *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953, the question again came before the Supreme Court and, while the jurisdiction to sue a corporation in the State of its organization was maintained, yet the jurisdiction was not sustained upon the ground that the legal entity, both invisible and intangible, was a citizen in the meaning of the Constitution, but it was held that the presumption arising from the habitat of a corporation in the place of its creation was conclusive as to the residence or the citizenship of those who use the corporate name; in other words, the presumption was conclusive that the stockholders and members of the corporation were citizens of the State where the corporation was organized, and the corporation as defendant could not deny it, nor, when suing as plaintiff, could the defendant look beyond the corporation to show want of diversity by reason of the citizenship of its members.

This theory that the citizenship of the members composing the corporation is indisputably a citizenship of the State creating the corporation has been adhered to ever since, and the simple allegation that a party is a body corporate, created and organized under and by virtue of the statutes of a particular State, fixes the citizenship as a jurisdictional question. The doctrine thus established has vastly increased the area of Federal jurisdiction, and the fiction by which it has been accomplished has been severely criticised. We find the courts have since been often pressed to extend the fiction, but have firmly resisted the creation of further artificial citizens for jurisdictional purposes, truly declaring that in what has already been done they had reached the verge of judicial power. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 645; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 555, 40 L. ed. 806, 16 Sup. Ct. Rep. 621; *Barrow S. S. Co. v. Kane*, 170 U. S. 107, 42 L. ed. 967, 18 Sup. Ct. Rep. 526; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 664, 42 L. ed. 317, 17 Sup. Ct. Rep. 925; *Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 370, 34 L. ed. 363, 366, 10 Sup. Ct. Rep. 1004; *National S. S. Co. v. Tugman*, 106 U. S. 121, 27 L. ed.

88, 1 Sup. Ct. Rep. 58; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 283, 20 L. ed. 575; *United States v. S. P. Shotter Co.* 110 Fed. 2; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; *Hollingsworth v. Southern R. Co.* 86 Fed. 356; *Taylor v. Illinois C. R. Co.* 89 Fed. 119.

So, then, corporations, within the jurisdictional act, are citizens, and, upon the theory that individual members are citizens of the State of the incorporation, are indisputably citizens of the State granting the charter (*Ibid.*; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Germania F. Ins. Co. v. Francis*, 11 Wall. 216, 20 L. ed. 78; *Taylor v. Illinois C. R. Co.* *supra*; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Freeman v. American Surety Co.* 116 Fed. 549; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621); and a citizenship which cannot be changed (*Ibid.*; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Canadian Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363). The rules of diverse citizenship as a basis of jurisdiction in the Federal courts, as heretofore given, apply equally to corporations as to individuals (*Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 698-699; *Hirschl v. J. I. Case Threshing Mach. Co.* 42 Fed. 803; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 772); they are put on the same footing with individuals in respect to jurisdiction in suits by and against them (*Barrow S. S. Co. v. Kane*, 170 U. S. 106, 42 L. ed. 966, 18 Sup. Ct. Rep. 526).

But it is well known that corporations engage in business in other States than where created, and the rule further established that a State may require of a corporation the performance of any conditions not inconsistent with the laws and Constitution of the United States before being admitted to do business within the State. The restrictions and limitations have been as various as the States, and the clear purpose of many of them was to make the foreign corporation a corporation of the State in which it seeks to do business, and thereby

make it amenable to suits in State courts by citizens of the State. But the requirement of State laws, however expressed, as a condition precedent to doing business in a State, cannot change the rule of the citizenship of a corporation as above given, and cannot make the corporation a citizen of that State. *Hollingsworth v. Southern R. Co.* 86 Fed. 353, 355; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Taylor v. Illinois C. R. Co.* 89 Fed. 119; *Canada Southern R. Co. v. Gebhard*, *supra*; *London P. & A. Bank v. Aronstein*, 54 C. C. A. 663, 117 Fed. 607; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 699; *Rowbotham v. George P. Steele Iron Co.* 71 Fed. 758. In a word, you cannot change the corporation into a domestic corporation by prescribing conditions precedent to its entering the State to do business; you cannot change its citizenship so as to affect the jurisdiction of the Federal courts. *Ibid.*; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 560-563, 43 L. ed. 1085-1087, 19 Sup. Ct. Rep. 817; *Southern R. Co. v. Allison*, 190 U. S. 335, 336, 47 L. ed. 1082, 1083, 23 Sup. Ct. Rep. 713; *Consolidated Store-Service Co. v. Lamson Consol. Store-Service Co.* 41 Fed. 834.

To illustrate: A Missouri corporation endowed by the laws of Arkansas with all the powers and privileges of a domestic corporation cannot be sued by a citizen of Missouri in the Federal courts of Arkansas. For jurisdictional purposes it is still a citizen of Missouri, and two citizens from the same State cannot sue in the Federal courts of another State. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Hollingsworth v. Southern R. Co.* 86 Fed. 353. This presumption of citizenship of a corporation in a State where organized accompanies corporations wherever they may do business beyond the limits of such State, and it may sue or be sued in the Federal courts in other States as a citizen of the State of its incorporation.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 562, 43 L. ed. 1086, 19 Sup. Ct. Rep. 817, the court says that a corporation of one State may be made a corpora-

tion of another State by the legislature in regard to property and acts within its territorial jurisdiction, but in order to make corporations already in existence under the laws of one State a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State or by the legislature. The mere grant of privileges and powers as an existing corporation does not do this. *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 296, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Markwood v. Southern R. Co.* 65 Fed. 824; *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 585, 27 L. ed. 520, 2 Sup. Ct. Rep. 432; *Goodlett v. Louisville & N. R. Co.* 122 U. S. 404, 30 L. ed. 1232, 7 Sup. Ct. Rep. 1254; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533. In *Taylor v. Illinois C. R. Co.* 89 Fed. 119, the court, construing a statute of Kentucky, which required a foreign corporation to incorporate therein, and upon compliance provides "it shall become a corporation citizen and resident of the State," held a citizen of Kentucky could sue it in a Federal court. Here we reach a point where this question of the citizenship of corporations as affecting the jurisdiction of the Federal courts becomes apparently complicated, and especially in its application to railroad corporations leasing and operating lines in other States, or in consolidating various independent railway corporations of other States under one system and one name.

A railway company organized in one State does not make itself a citizen of another State by leasing and operating a railway therein. *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 592. So, a railway company owning and operating a line through several States may receive and exercise powers granted by each State and may, for many purposes, be recognized as a corporation of each State, but that does not, with reference to Federal jurisdiction, make it a citizen of every State it passes through. *St. Joseph & G.*

*I. R. Co. v. Steele*, 167 U. S. 663, 664, 42 L. ed. 316, 317, 17 Sup. Ct. Rep. 925; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

But sometimes corporations are created by co-operating legislatures of several States, but such corporation cannot have one and the same legal being in both States; they are still distinct corporations deriving their powers from distinct sovereigns; and such corporations, though they be under one system and under one name, cannot unite as plaintiffs in a Federal court against a citizen of either State which chartered them. *Ibid.*; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286, 17 L. ed. 130; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 585, 27 L. ed. 520, 2 Sup. Ct. Rep. 432; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 505.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, a corporation originally created by the laws of Indiana brought suit in Kentucky against citizens of Kentucky and Illinois. Plaintiff before suit was made a corporation of Kentucky, and pending suit was made a corporation of Illinois by consolidation with an Illinois corporation. The court says the plaintiff was first made a corporation of Indiana, and, whatever may have been done by consolidation or otherwise afterwards, for jurisdictional purposes it remained a corporation of Indiana. It could neither have brought suit as a corporation of both States against a corporation or citizen of either State, nor could it sue or have been sued as a corporation of Kentucky in the Federal courts. The court held jurisdiction to adjudicate its rights as a corporation of Indiana. *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *St. Louis & S. F. R. Co. v. James*, *supra*; *Alabama & G. Mfg. Co. v. Riverdale Cotton Mills*, 62 C. C. A. 295, 127 Fed. 497.

Where three railroad corporations organized under the laws of different States are consolidated under the laws of each State, the consolidated corporation is a citizen of each State, and a citizen of any of the States where organized cannot sue the corporation in the Federal courts in a State of which he is a citizen (*Winn v. Wabash R. Co.* 118 Fed. 55; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Dodd v. Louisville Bridge Co.*

130 Fed. 195, 196; *Paul v. Baltimore & O. & C. R. Co.* 44 Fed. 513; *Baldwin v. Chicago & N. W. R. Co.* 86 Fed. 167; *Westheider v. Wabash R. Co.* 115 Fed. 840; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 169, 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *Missouri P. R. Co. v. Meeh*, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753), but a citizen of one State of its incorporation may sue it in the Federal courts of another State of its incorporation (*Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 656-662; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 375, 376, 34 L. ed. 368, 10 Sup. Ct. Rep. 1004; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. 609; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986). Thus it seems that a corporation may be so created as to have the constituent parts—citizens of different States, as

*First.* When it is created a corporation by different States. *Ibid.*; *Graham v. Boston, H. & E. R. Co.* supra; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 563, 43 L. ed. 1087, 19 Sup. Ct. Rep. 817; *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 358.

*Second.* When several corporations of different States are consolidated by the legislatures of the several States. *Ibid.*; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 815, 816; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 363, 10 Sup. Ct. Rep. 1004; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 283, 20 L. ed. 575; *Muller v. Dows*, 94 U. S. 447, 24 L. ed. 208; *Dodd v. Louisville Bridge Co.* 130 Fed. 195; *Winn v. Wabash R. Co.* and *Baldwin v. Chicago & N. W. R. Co.* supra; *Missouri P. R. Co. v. Meeh*, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753-757.

*Third.* Whatever may be the actions of States jointly or severally creating corporations, the corporate entity in each State cannot be destroyed to affect jurisdiction. So, then, I state the rule of citizenship and jurisdiction under these conditions as follows:

When a foreign corporation simply becomes an adopted child of another State, by conforming to the requirements of the State, such corporation may be regarded as a citizen of its own

State of incorporation, and may be sued in the Federal courts of the adopted State by its citizens, but not by the citizens of the State of its incorporation. *Ibid.*; *Southern R. Co. v. Allison*, *supra*; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433; *St. Joseph & G. I. R. Co. v. Steele*, *supra*; *Taylor v. Illinois C. R. Co.* 89 Fed. 121, 122; *Hollingsworth v. Southern R. Co.* 86 Fed. 353; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 505; *Goodwin v. New York, N. H. & H. R. Co. and St. Louis & S. F. R. Co. v. James*, *supra*. That where several corporations are originally created by several States, which afterwards by authority unite for business purposes under a common name; or independent corporations of various States are consolidated into one corporation by the legislation of the several States originally creating them,—then the consolidated corporation is a citizen of each State, and the citizen of one of the States cannot maintain an action in the Federal courts of *that* State on the ground of diverse citizenship, as the corporation is a citizen of that State, and you must ignore its corporate existence elsewhere (*Ibid.*; *Baldwin v. Chicago & N. W. R. Co.* *supra*; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 20 L. ed. 571; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 656); but a citizen of one State of its incorporation may sue the corporation in the Federal courts of the other States where incorporated (*Ibid.*). Thus, in *Williamson v. Krohn*, *supra*, a consolidated Ohio and Kentucky corporation was sued by a citizen of Ohio in the Federal courts of Kentucky; held, suit properly brought. *Ibid.*; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 812; *Goodwin v. New York, N. H. & H. R. Co.* *supra*.

We see, then, in this discussion of the citizenship of corporations—

*First.* That a corporation cannot, like a natural person, change its domicil, but its home, residence, domicil and citizenship is where it was originally created, and can be nowhere else. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768,



12 Sup. Ct. Rep. 935; *Germania F. Ins. Co. v. Francis*, 11 Wall. 216, 20 L. ed. 78.

*Second.* That doing business away from home does not affect its citizenship. *Markwood v. Southern R. Co.* 65 Fed. 817; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 12, 26 L. ed. 645; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533.

*Third.* That conditions fixed by a State other than the State of its origin, before it can do business in that State, does not affect its citizenship. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 296, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Markwood v. Southern R. Co.* 65 Fed. 824; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 565, 43 L. ed. 1088, 19 Sup. Ct. Rep. 817; *Hollingsworth v. Southern R. Co.* 86 Fed. 356; *Taylor v. Illinois C. R. Co.* 89 Fed. 120; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 663, 42 L. ed. 316, 17 Sup. Ct. Rep. 925.

*Fourth.* That two or more States cannot join in creating a single corporation for jurisdictional purposes; the distinct citizenship in each State cannot be destroyed. *Missouri P. R. Co. v. Meeh*, *supra*; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 507; *Walters v. Chicago, B. & Q. R. Co.* 104 Fed. 378; *Clark v. Barnard*, 108 U. S. 452, 27 L. ed. 786, 2 Sup. Ct. Rep. 878; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 165, 30 L. ed. 200, 6 Sup. Ct. Rep. 1009; *Baldwin v. Chicago & N. W. R. Co.* 86 Fed. 167; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 20, 21, 45 L. ed. 406, 407, 21 Sup. Ct. Rep. 240.

*Fifth.* The corporation must be lawfully created. *Gastonia Cotton Mfg. Co. v. W. L. Wells Co.* 63 C. C. A. 111, 128 Fed. 369. See *s. c.* in 198 U. S. 177, 49 L. ed. 1003, 25 Sup. Ct. Rep. 640.

### *Citizenship of Alien Corporations.*

The same rules apply to the citizenship of alien corporations; its foreign citizenship of the country where organized is conclusive. *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58. See *Robertson v. Scottish Union & Nat. Ins. Co.* 68 Fed. 173, as to proper allegations of foreign citizenship.

## CHAPTER XIV.

### JOINT STOCK COMPANIES.

These companies partake of the nature of both partnerships and corporations. There has been much conflict of opinion as to whether joint stock companies are citizens of the State of organization in the light of the Federal jurisdictional acts. *Youngstown Coke Co. v. Andrews Bros. Co.* 79 Fed. 669; *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 Fed. 404; *Bushnell v. Park Bros.* 46 Fed. 209; *Carnegie v. Hurlbert*, 3 C. C. A. 391, 10 U. S. App. 454, 53 Fed. 11; *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 153. In *Imperial Ref. Co. v. Wyman*, 3 L.R.A. 503, 38 Fed. 574, Judge Hammond doubted the policy of extending corporate citizenship to these nondescript organizations. In *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 293, 58 U. S. App. 444, 86 Fed. 585, it was held that a partnership association limited is a corporation. In *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426, the Supreme Court required the citizenship of the members of the association to be alleged, and the question of the jurisdiction of the Federal court was based on citizenship of the members, rather than upon the place of organization. And in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690, 177 U. S. 449, it is held that such associations are not corporations within the rule that in a suit by or against a corporation in a Federal court, it is conclusively presumed to be a citizen of the State creating it. *Thomas v. Ohio State University*, 195 U. S. 211, 212, 49 L. ed. 164, 165, 25 Sup. Ct. Rep. 24. It is now settled that joint stock companies are not corporations within the jurisdictional act, and jurisdiction depends on the citizenship of the members of the association. *Saunders v. Adams Exp. Co.* 136 Fed. 494; *Rountree v. Adams Exp. Co.* 91 C. C. A. 186, 165 Fed. 152.

*Partnership.*

The same rule would apply to partnership and voluntary associations, who cannot sue or be sued in the Federal courts unless the citizenship of the individuals composing them will permit. *Raphael v. Trask*, 118 Fed. 777; *H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co.* 174 Fed. 669, 672; *Jewish Colonization Asso. v. Solomon*, 125 Fed. 994; *Derk P. Youkerman Co. v. Charles H. Fuller's Advertising Agency*, 135 Fed. 613; *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 727; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Thomas v. Ohio State University*, 195 U. S. 212, 49 L. ed. 164, 25 Sup. Ct. Rep. 24.

*National Banks.*

Up to 1882 the right of the national banks to sue or be sued in the Federal courts was based on their Federal origin. In 1882 these corporations were by act of Congress placed upon the same footing as to jurisdiction in the Federal courts as were banking associations not organized under Federal law. Act July 12, 1882, 22 Stat. at L. 162, chap. 290, U. S. Comp. Stat. 1901, p. 3457. This left the jurisdiction as to these banks, except when the United States was a party, dependent on diversity of citizenship or a Federal question. *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325. In 1888 (25 Stat. at L. 443, chap. 891, U. S. Comp. Stat. p. 392) the jurisdictional and removal act embodied in section 4 the following provision: That national bank associations in all suits in law or equity by or against them shall be deemed citizens of the State in which they are respectively located, and Federal courts had no jurisdiction other than such as they would have in cases between individual citizens of the same State (*First Nat. Bank v. Forrest*, 40 Fed. 705), unless the suit is brought by the United States or its officers, or in winding up the affairs of such banking association. Act Aug. 13, 1888, 224. See appendix p. —; *American Nat. Bank v. Tappan*, 174 Fed. 431; *George v. Wallace*, 68 C. C. A. 40, 135 Fed. 286; *Rankin v. Herod*, 130 Fed. 390; *Continental*

Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Wyman v. Wallace, 201 U. S. 230, 50 L. ed. 738, 26 Sup. Ct. Rep. 495. In Danahy v. National Bank, 12 C. C. A. 75, 24 U. S. App. 351, 64 Fed. 148; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222, and Speckhert v. German Nat. Bank, 38 C. C. A. 682, 98 Fed. 151, the last act has been construed, and the bank declared to have all the rights of a citizen of the State in which such bank is situated to enter the Federal courts; that only jurisdiction based on the Federal origin of these banks was cut off. But Federal courts have exclusive jurisdiction when national banks are insolvent, in winding up its affairs. Ibid; Wyman v. Wallace and George v. Wallace, supra; Weeks v. International Trust Co. 60 C. C. A. 236, 125 Fed. 370; First Nat. Bank v. Selden, 62 L.R.A. 559, 56 C. C. A. 532, 120 Fed. 212.

See chap. 2, sec. 24, clause 16, of New Code effective January 1st, 1912.

### *Citizenship of Married Women.*

While the domicile of the husband is that of the wife, yet this rule would not apply when married woman abandoned. Watertown v. Greaves, 56 L.R.A. 865, 50 C. C. A. 172, 112 Fed. 183; Thompson v. Stalman, 139 Fed. 93; Ware v. Wisner, 50 Fed. 312.

A citizen marrying an alien female, she becomes a citizen. U. S. Rev. Stat. § 1994, U. S. Comp. Stat. 1901, p. 1268, Fed. Stat. Anno. 1909, p. 69. United States ex rel. Nicola v. Williams, 173 Fed. 626; Comititis v. Parkerson, 22 L.R.A. 148, 56 Fed. 561; Broadis v. Broadis, 86 Fed. 951; Pequignot v. Detroit, 16 Fed. 211; United States v. Kellar, 11 Biss. 314, 13 Fed. 82. But if she becomes an alien by marriage, in order to obtain jurisdiction you must plead the law producing that effect, or jurisdiction will not be shown. Fed. Stat. Anno. 1909, p. 69; Jennes v. Landes, 84 Fed. 74; Wallenburg v. Missouri P. R. Co. 159 Fed. 217; Buckgaher v. Moore, 104 Fed. 947; Jenns v. Landes, 85 Fed. 801.

### *Aliens.*

Closely connected with the diversity of citizenship as a

ground of jurisdiction in the Federal courts is the right of an alien to sue and be sued in the courts of the United States. The Constitution, article 3, section 2, clause 1, provides that the judicial power shall extend to all cases in law and equity arising between a State, or the citizens thereof, and foreign States, citizens, and subjects. The judiciary act of 1888 provides that when the controversy is between citizens of a State and foreign States, citizens and subjects, and the amount or value in controversy exceeds the sum of two thousand dollars, exclusive of interest and costs, the circuit courts of the United States shall have jurisdiction. This provision of the judiciary act has, of course, been frequently construed, and I will briefly give the rules affecting the jurisdiction of the Federal courts in dealing with suits in which aliens are parties plaintiff or defendant.

As indicated in the act, aliens are citizens or subjects of a foreign government, and the jurisdiction is given when the controversy is between a citizen or citizens of a State and a citizen or citizens and subjects of a foreign State; and it seems a mere declaration of intention to become a citizen does not make him such, so far as jurisdiction is concerned. *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1. "Alien," as used in the act, is defined in *Hennessy v. Richardson Drug Co.* 189 U. S. 34, 47 L. ed. 698, 23 Sup. Ct. Rep. 532.

A citizen within the provisions of the act may sue an alien, or an alien may sue a citizen. Act March 3, 1887, U. S. Comp. Stat. 1901, p. 508; *Hennessy v. Richardson Drug Co.* supra. See note to *Sherwood v. Newport News & M. Valley Co.* 55 Fed. 5; *Barlow v. Chicago & N. W. R. Co.* 172 Fed. 515; *Tierney v. Helvetia Swiss F. Ins. Co.* 163 Fed. 83. But such suits are not suits between citizens of different States; therefore the clause of the jurisdictional act requiring suit to be brought in the district of the residence of plaintiff or defendant does not apply to a suit against aliens, and he may be sued in the district where he may be found (*Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Barrow S. S. Co. v. Kane*, 170 U. S. 112, 42 L. ed. 968, 18 Sup. Ct. Rep. 526), or where valid service can be made on him (*Ibid.*; *Barlow v. Chicago & N. W. R. Co.* supra). The same rule applies to alien corporations. *Barrow S. S. Co. v. Kane*, supra; *Société*

*Foncière v. Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Re Hohorst*, 150 U. S. 654, 37 L. ed. 1212, 14 Sup. Ct. Rep. 221.

However, where an alien sues a citizen, he must sue him in the Federal district of which the citizen is an inhabitant (*Campbell v. Duluth*, S. S. & A. R. Co. 50 Fed. 242; *Iowa Lilloet Gold Min. Co. v. Bliss*, 144 Fed. 446; *Miller v. New York C. & H. R. R. Co.* 147 Fed. 772; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401), unless to enforce liens on property, then where property located (*De Hierapolis v. Lawrence*, 99 Fed. 321). Thus, an alien can only sue a corporation where organized (*Ibid.*; *Campbell v. Duluth* S. S. & A. R. Co. *supra*; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 65; *Denton v. International Co.* 36 Fed. 3; *Sherwood v. Newport News & M. Valley Co.* 55 Fed. 4; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 137); but it seems that a corporation, when sued by an alien in a State court and out of the State of its organization, may remove the suit to a Federal court in such State (*Iowa Lilloet Gold Min. Co. v. Bliss*, 144 Fed. 450. See note to *Sherwood v. Newport News & M. Valley Co. supra*; *Stalker v. Pullman's Palace-Car Co.* 81 Fed. 989; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 849; *Duncan v. Associated Press*, 81 Fed. 420). The question has arisen whether an alien when sued in a State court can remove the case to a Federal court. In *Texas v. Lewis*, 12 Fed. 1, and same case in 14 Fed. 65, it is said an alien has the right of removal under the act, but in *Cudahy v. McGeoch*, 37 Fed. 1, it was said that an alien, under the act of 1887, section 3, could not remove a case when sued in a State in which he resided; nonresidence is a requisite. *Walker v. O'Neill*, 38 Fed. 374; *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 2. So, he can remove if sued in a State in which he does not reside.

The right of removal from State to Federal courts by aliens will be discussed under "Removals."

### *Alien and Citizen Uniting.*

An alien cannot unite with a citizen of a State in the citizen's district, and sue citizens of other States. *Conolly v. Tay-*

lor, 2 Pet. 565, 7 L. ed. 521. Nor can citizens of a State unite as defendants an alien and citizen of another State, as all the plaintiffs sued in the plaintiff's district, or all of the defendant if sued in the defendant's district, must be aliens. Gage v. Riverside Trust Co. 156 Fed. 1002; Tracey v. Morel, 88 Fed. 803; King v. Cornell, 106 U. S. 398, 27 L. ed. 61, 1 Sup. Ct. Rep. 313; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 386, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367. These cases hold that where an alien and citizen are joined as defendants in a State court, the alien, though having a separable controversy, can remove the case to a Federal court. In Roberts v. Pacific & A. R. & Nav. Co. 58 C. C. A. 61, 121 Fed. 787, these cases are reviewed, and the conclusion reached that a suit brought in a State court against a citizen of another State and an alien can be removed by either defendant, because if either had been sued alone the cause could have been removed by either; that in such case, if the defendants joined in a petition for removal, a Federal court could take jurisdiction. This case clearly denies the doctrine stated in Black's Dillon, Removal of Causes, sections 68, 84.

When the suit has been brought by or against an alien, and the jurisdiction once attaches in the Federal court, the fact that a citizen was admitted as a coplaintiff or codefendant upon application would not defeat the Federal jurisdiction. Graham v. Boston, H. & E. R. Co. 14 Fed. 754. So, where an alien having brought suit in a Federal court under the act permitting it, the fact that the alien becomes a citizen pending the suit does not divest the jurisdiction. Betzholdt v. American Ins. Co. 47 Fed. 707; Conolly v. Taylor, 2 Pet. 556, 7 L. ed. 518.

### *Alien Suing Alien.*

An alien cannot sue an alien in the Federal courts, either alone or by joining citizens (Pooley v. Luco, 72 Fed. 561-564; Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 151 U. S. 386, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Rae v. Grand Trunk R. Co. 14 Fed. 402; Hartog v. Memory, 23 Fed. 835; Montalet v. Murray, 4

Cranch, 47, 2 L. ed. 545; Gage v. Riverside Trust Co. 156 Fed. 1007); unless there be a Federal question, when citizenship becomes unimportant, as we will hereafter see (Gage v. Riverside Trust Co. 156 Fed. 1002).

*As to Allegation of Alienage.*

The act of Aug. 13, 1888, gives cognizance of controversies between citizens of a State and foreign States, citizens or subjects, and it was held, in view of this language, that a plaintiff describing himself as a "resident of Ontario, Canada, and a citizen of the Dominion of Canada and of the Empire of Great Britain," is not a sufficient averment of alienage; that Canadians are subjects of the King of England, and should be so described. *Rondot v. Rogers Twp.* 25 C. C. A. 145, 47 U. S. App. 290, 79 Fed. 677; *Von Voight v. Michigan C. R. Co.* 130 Fed. 398; *Stuart v. Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; *Jennes v. Landes*, 84 Fed. 74. So, one cannot allege a foreign corporation as a citizen of Great Britain. *Oregonian R. Co. v. Oregon R. & Nav. Co.* 27 Fed. 279. "Citizens of the Republic of France" is a sufficient allegation of alienage. *Hennessy v. Richardson Drug Co. Co.* 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532.

(See Bill, p. 270.)



## CHAPTER XV.

### TERRITORIAL JURISDICTION.

Having referred generally to resident and nonresident citizenship as affecting jurisdiction in the Federal courts, I will now take up the statutory conditions as to the place of suit, that is, the judicial district in which suit can be brought. It is embodied in the act of 1888, as follows:

"No civil suit shall be brought before either of said courts (circuit and district) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant."

In order to fully understand the decisions as to place of suit or venue, it is necessary to briefly refer to the judiciary acts of 1789 and 1875.

In the original judiciary act of 1789 the venue was fixed as follows: Jurisdiction was given over all suits at law or in equity between a citizen of the State in which the suit is brought and a citizen of another State, and the place of suit was fixed in these words: "No suit shall be brought against *an inhabitant of the United States* in any other district than that of which he is an inhabitant, or *in which he shall be found* at the time of serving the writ." Then came the general act of 1875, greatly enlarging the jurisdiction of the Federal courts, but did not change the clause affecting the district of suit. However, the words, "an inhabitant of the United States," in the act of 1789, were substituted by the words "any person."

The act of 1888 changed the venue clause materially by leaving out the words, "in which he may be found at the time of serving the writ or commencing the proceedings," and the *place of suit* was confined to *the district* of which the defendant is

an inhabitant, except when the jurisdiction is founded on the fact that the controversy is between citizens of different States, then it shall be brought only in the district of the residence of either the plaintiff or defendant. Act Aug. 13, 1888, U. S. Comp. Stat. 1901, p. 508; *Re Keashey & M. Co.* 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; *United States v. Southern P. R. Co.* 49 Fed. 299, 300; *McCormick v. Walthers*, 134 U. S. 41-43, 33 L. ed. 833, 834, 10 Sup. Ct. Rep. 485; *Miller v. Pennsylvania R. Co.* 91 Fed. 298; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Jewett v. Garrett*, 47 Fed. 630; *United States Fidelity & G. Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 144.

See sec. 51, chap. 4, New Code.

It is thus seen that for one hundred years a defendant could be sued in his own district, or in any Federal district in which he may be found. Many hardships necessarily attended this practice of catching a transient defendant, and it has in a measure been corrected, in the act of 1888, by only permitting a citizen to be sued out of his district when jurisdiction depended on diversity of citizenship, and equalizing the inconvenience by permitting the plaintiff to go to defendant's district, or making the defendant come to plaintiff's district to be sued. *Bank of Winona v. Avery*, 34 Fed. 81; *Bostwick v. American Finance Co.* 43 Fed. 897, 898, and authorities cited. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 385; *Rawley v. Southern P. R. Co.* 33 Fed. 305.

So we have in personal suits two forms when jurisdiction depends on diversity of citizenship, but when jurisdiction is based on a Federal question, or any other provision of the jurisdictional act, there is only one place of suit under the act 1888, and that is in the district of which the defendant is an inhabitant. *Jewett v. Garrett*, 47 Fed. 632, 633. Therefore the rule is, under the present act, that in personal suits between citizens of different States, you must sue the defendant in his own State, and in the judicial *district* of which he is an inhabitant, or you may sue him in your State and in the Federal *district* of which you are an inhabitant, if your jurisdiction in the Federal court depends on diversity of citizenship, and defendant can be served there. *Ibid.*; *Shaw v. Quincy Min. Co.* 145 U. S. 448, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Danciger v. Wells, F. & Co.* 154 Fed. 379; *Gale v. Southern Bldg. & L.*

Asso. 117 Fed. 734; Goddard v. Mailler, 80 Fed. 422; Dinzy v. Illinois C. R. Co. 61 Fed. 50; Kibbler v. St. Louis & S. F. R. Co. 147 Fed. 880, 881; Pitkin County Min. Co. v. Markell, 33 Fed. 387; American Locomotive Co. v. Dickson Mfg. Co. 117 Fed. 972. But if the jurisdiction depends on other provisions of the Federal act, such as a Federal question, or an alien suing a citizen, then suit must be brought in the district whereof the defendant is an inhabitant. *Ibid.*; *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Galveston H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Cramer v. Singer Mfg. Co.* 59 Fed. 74; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287, 288; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 601.

*Venue When Jurisdiction Depends on Both Diversity and Federal Question.*

In *Cound v. Atchison, T. & S. F. R. Co.* supra, the jurisdiction of the Federal court was based on both diversity of citizenship and a Federal question. The case was brought in the residence district of plaintiff against the defendant, a foreign corporation, but operating its railroad in plaintiff's district of residence and citizenship. A plea to the jurisdiction was sustained, on the ground that plaintiff, to sue in his own district, can only do so where diversity of citizenship is the *only* ground of jurisdiction. Thus a very strict construction was given to the word "only" in the latter clause of the first section of the act of 1888 (U. S. Comp. Stat. 1901, p. 508). The narrow view of the word "only" was attacked in *Whittaker v. Illinois C. R. Co.* 176 Fed. 131, but the court, in sustaining the former case, seemed to think the question was not an open one, citing *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485. See *Adriance P. & Co. v. McCormick Harvesting Mach. Co.* supra.

*Exceptions to the Rule.*

The provision that the defendant *must* be sued in his own district does not apply to "patent" suits. U. S. Rev. Stat. sec.

711, sub-div. 5, U. S. Comp. Stat. 1901, p. 578, act of 1897 (U. S. Comp. Stat. 1901, p. 589). *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221. These cases were decided under the act of 1887, but under the act of 1897, cited above, the suit may be brought either in defendant's residence district, or in any district in which infringement was committed, if he can be served there. *Bowers v. Atlantic, G. & P. Co.* 104 Fed. 887; *Westinghouse Air-Brake Co. v. Great Northern R. Co.* 31 C. C. A. 525, 59 U. S. App. 592, 88 Fed. 261, 262. New Code, chap. 4, sec. 48. Nor does it apply where a citizen sues an alien. *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.* 133 Fed. 931, 932; *Earl v. Southern P. Co.* 75 Fed. 610; *Barlow v. Chicago & N. W. R. Co.* 172 Fed. 516; *Davidson Bros. Marble Co. v. United States*, 213 U. S. 10, 53 L. ed. 675, 29 Sup. Ct. Rep. 224. In *United States v. Southern P. R. Co.* 49 Fed. 301, it was said that the first section of the act of 1887 as to venue did not control, where the United States was a party plaintiff; but in *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715, a different conclusion is reached, and the United States, when coming into its courts as a litigant, is subject to the requirements of section 1 of the act of 1888.

Again, the rule of venue does not apply when brought for infringement of copyrights. U. S. Rev. Stat. § 4966, U. S. Comp. Stat. 1901, p. 3415. *Lederer v. Rankin*, 90 Fed. 449; *Spears v. Flynn*, 102 Fed. 7; *Lederer v. Ferris*, 149 Fed. 250. Nor do the limitations apply when suit is brought under the interstate commerce law to recover damages. Interstate commerce act, secs. 8-9. *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 981; *Edmunds v. Illinois C. R. Co.* 80 Fed. 79; *Kalispell Lumber Co. v. Great Northern R. Co.* 157 Fed. 845.

So, the rule does not apply in suits arising under special laws of Congress creating rights and giving exclusive jurisdiction to the Federal courts such as acts concerning Federal revenues; or Federal anti-trust laws (26 Stat. at L. 209, chap. 646, U. S. Comp. Stat. 1901, p. 3253), or alien contract labor (26 Stat. at L. 1084, chap. 551, U. S. Comp. Stat. 1901, p. 1294), or United States public lands (23 Stat. at L. 321, chap. 149, U. S. Comp. Stat. 1901, p. 1524), or condemning land for

public use (25 Stat. at L. 357, chap. 728, U. S. Comp. Stat. 1901, p. 2516). Special acts of the character above stated usually fix the venue, and must be followed (United States v. Mooney, 116 U. S. 107, 108, 29 L. ed. 551, 552, 6 Sup. Ct. Rep. 304); otherwise the suit may be brought where the defendant may be found.

So, it may be said generally that the clause of the judiciary act requiring suit in the residence district of defendant applies only to cases where State and Federal courts have concurrent jurisdiction. *Re Keasbey & M. Co.* and *Re Hohorst*, *supra*; *Van Patten v. Chicago, M. & St. P. R. Co.* 74 Fed. 985-987; *Lederer v. Ferris*, 149 Fed. 251.

### *Inhabitant Defined.*

You will observe that the word "inhabitant" is used instead of "citizen," in the act of 1888; "the district of which a party is an inhabitant," is the language. This is construed to mean the district of his residence. *Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935. The word "inhabitant" has the same meaning as "citizen." *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 819, 820; *Bicycle Step-ladder Co. v. Gordon*, 57 Fed. 529, 530; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 504, 38 L. ed. 251, 14 Sup. Ct. Rep. 401. See *United States v. Southern P. R. Co.* 49 Fed. 297; *Holmes v. Oregon & C. R. Co.* 9 Fed. 229. And "citizenship" means *permanent* residence or domicile, which is residence acquired as a final abode. *Morris v. Gilmer*, 129 U. S. 328, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Gaddie v. Mann*, 147 Fed. 956; *Mitchell v. United States*, 21 Wall. 352, 22 L. ed. 587; *Marks v. Marks*, 75 Fed. 324; *Chambers v. Prince*, 75 Fed. 176; *Ex parte Petterson*, 166 Fed. 545, but jurisdiction depends on "citizenship," not residence. *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 624; *Marks v. Marks*, 75 Fed. 321; *Wolfe v. Hartford Life & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873.

I will observe here, but it will be fully illustrated hereafter, that this provision of the act concerning venue does not affect the general jurisdiction of the courts, but only provides a per-

sonal exemption or privilege, which may be waived if not pleaded. *Platt v. Massachusetts Real Estate Co.* 103 Fed. 706; *Cowell v. City Water Supply Co.* 96 Fed. 769, and authorities cited. *Duncan v. Associated Press*, 81 Fed. 418; *Louisville & N. R. Co. v. Fisher*, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 69; *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 902; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98, 14 Sup. Ct. Rep. 286.

*District of Suit When Two or More Plaintiffs and Defendants.*

The rules heretofore given as to the particular State and district of suit can be applied without any practical difficulty when there is only one plaintiff and one defendant, but some difficulty is apparent when there are numerous plaintiffs and defendants residing in different States, or various districts of the same State, or in the several divisions of the same district, which then existed in some States. *Goddard v. Mailler*, 80 Fed. 423, 424. The rule is that in personal actions, where there are two or more plaintiffs or defendants, suit must be brought in the State and district of plaintiffs' or defendants' citizenship, if the jurisdiction is based on diversity of citizenship and residence; and if brought in plaintiffs' residence district, and there be two or more plaintiffs, then all the plaintiffs must be inhabitants of the district; but if brought in defendants' residence district, then all of the defendants must be inhabitants of the district. *Lengel v. American Smelting & Ref. Co.* 110 Fed. 21; *Freeman v. American Surety Co.* 116 Fed. 550; *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* 42 Fed. 81; *Jenkins v. York Cliffs Imp. Co.* 110 Fed. 809, 810; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 76. That is, the words "plaintiff" and "defendant," as before stated, are used in the act in a collective sense. *Ibid.* It means that parties from different States may join in suing a defendant in defendant's district; or any number of defendants, if they all reside in the same district, or that several parties plaintiff, if they reside in the same district, may sue any number of de-

fendants from different States in the district of plaintiffs' residence.

It will be seen that this change in the venue clause of the jurisdictional act was in furtherance of the spirit of the act, the purpose of which was to limit the jurisdiction of the Federal court, and to narrow the door of entrance. The restrictive effect of this clause has been very inconvenient at times to litigants, who would prefer a jurisdiction reasonably free from local prejudices and influence.

A case involving a personal suit may be clearly within Federal jurisdiction; yet if there was more than one indispensable defendant, the suit could not be brought if they lived in different districts or States; and when jurisdiction is dependent on divers citizenship, while the suit may be brought in the residence district of the plaintiff, yet if there is more than one plaintiff jointly interested, and they live in different districts, it would be fatal to the suit *if objection* was made. *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303.

See section 740, which has been re-enacted in the New Code, chap. 4, sec. 52, and provides that where there are two or more districts in a State and there are two or more defendants to a suit not of a local nature, residing in different districts of the State, that process may issue to the defendants not residing in the district of suit, provided the suit is brought in a district where one of the defendants resides. So this section now controls all cases not of a local nature against defendants residing in the same State, and citizens thereof, but living in different districts of the State. See discussion of sec. 740, p. 101.

## CHAPTER XVI.

### RULE OF VENUE UNDER OTHER PROVISIONS OF SECTION 1, AND EXCEPTIONS.

Under the other provisions of the first section of the judiciary act, suit must be brought in the district of *defendant's residence only*. There are undoubted exceptions to this rule.

First. By U. S. Rev. Stat. sec. 741, U. S. Comp. Stat. 1901, p. 588, it is provided that in suits of a local nature, if there be but one defendant, or there be more than one residing in different districts from the *locus* of the subject-matter of the suit, in which district the suit is brought, the plaintiffs may have process to the district or districts where the defendant or defendants reside. See also acts 1902, reorganizing the Federal districts in Texas. See sec. 54, chap. 4, New Code, embodying U. S. Rev. Stat. sec. 741. By section 742 it is provided that in a suit of a local nature, where the land or other subject-matter of a fixed character lies in more than one district within the same State, suit may be brought in either district, and process issued and executed as in section 741. See sec. 55, chap. 4, New Code, embodying U. S. Rev. Stat. sec. 742. Prior to the passage of this act in 1858, embodied in the above sections, there was no way of reaching a defendant beyond the district in local suits, nor where there were several defendants residing beyond the district of suit process could not reach them. The conditions were embarrassing to Federal courts of equity when all parties interested in the subject-matter must be brought in to enter a proper decree, and this embarrassment increased with the growth of the country and the multiplicity of Federal districts in the same State.

While these changes greatly enlarged the field of Federal process and the efficiency of its equity courts, yet you will observe these statutes were confined to reaching parties and different districts of the same State, and there was yet no way by



which parties out of the State, but interested in the subject-matter, could be reached by Federal process, however great the necessity for bringing them in. Section 737 of the U. S. Rev. Stat. only provided for proceeding without them, if not indispensable; that is, where they may have been only proper or necessary parties. It provided for dismissing parties, and not bringing them into the suit. The language of that act was: "Where there are several defendants in a suit in equity, and one or more of them are neither inhabitants of, nor found in the district of suit, and do not voluntarily appear, the court may proceed without them to adjudicate between the parties properly before the court." See sec. 50, chap. 4, New Code, embodying sec. 737, U. S. Rev. Stat.

But under this statute, if the parties were *indispensable*, the court could not proceed. U. S. Rev. Stat. sec. 737, U. S. Comp. Stat. 1901, p. 587; Eq. Rule 47; Taylor v. Holmes, 14 Fed. 515; Shields v. Barrow, 17 How. 142, 15 L. ed. 158; Hazard v. Durant, 19 Fed. 475, 476; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; Gregory v. Swift, 39 Fed. 711, 712; Oberlin College v. Blair, 70 Fed. 419, 420; d' Auxy v. Porter, 41 Fed. 68; Detweiler v. Holderbaum, 42 Fed. 338; Hicklin v. Marco, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; Wall v. Thomas, 41 Fed. 620. Thus we see, if nonresidents had an interest in the land or personal property within the State, the Federal courts of equity were powerless to give relief to one who would litigate the title, or seek to remove the cloud or encumbrance thereon, unless the nonresident should voluntarily appear or come within the reach of the court's process. The case of Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825, illustrates the difficulties stated above, and which Congress subsequent to that case sought to remove. The first act passed was in 1872 (U. S. Rev. Stat. § 738), wherein provisions were made to reach nonresidents interested in real or personal estate in the district of suit. This act only applied in terms to courts of equity, but in 1875 was enlarged and applied to suits to enforce any *equitable* or *legal* claim to property, or lien on, or remove any encumbrance, lien, or cloud upon title to real or personal property within the district in which the suit is brought. It provided that in such suits, where one or more of the defendants were not inhabitants of the State or found in the S. Eq.—7.

district where suit is brought, the court may order the absent defendant to appear and plead and answer or demur. If practicable, the defendants are to be served with a copy of the order (*Batt v. Procter*, 45 Fed. 517), and if not, the service is authorized to be made by publication for six weeks. See Equity Rule 47, sec. 8, act 1875, specially retained in the act of 1888. See sec. 8, Appendix. See *infra*, chapter 58, where the forms for this procedure are given and the practice stated, p. 334. This section of the U. S. Rev. Stat. § 738, as enlarged in the judiciary act of 1875 as section 8, and retained in the present act of 1888 as section 5, has been construed in the following cases, and, being remedial, it will be seen that it has been construed liberally except in the issue of the process and its service. The principle embodied in the act of 1858 (U. S. Rev. Stat. §§ 741, 742, U. S. Comp. Stat. 1901, p. 588), was extended, the field of Federal process was pushed beyond State limits, and the Federal courts made vastly more efficient in settling rights of property where nonresidents were interested in the particular character of cases set forth in the section. (See sec. 8, act 1875, chaps. 17 and 58 herein.) *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285; *American F. L. M. Co. v. Benson*, 33 Fed. 456; *Kent v. Hosinger*, 167 Fed. 619; *Forsyth v. Pierson*, 9 Fed. 801; *United States v. American Lumber Co.* 80 Fed. 309; *Lancaster v. Asheville Street R. Co.* 90 Fed. 129; *Pollitz v. Farmers' Loan & Trust Co.* 39 Fed. 707; *Wheelwright v. St. Louis, N. O. & O. Canal & Transp. Co.* 50 Fed. 709; *Carpenter v. Talbot*, 33 Fed. 538; *Single v. Scott Paper Mfg. Co.* 55 Fed. 553, but see *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954; *Morris v. Graham*, 51 Fed. 56; *McBee v. Marietta & N. G. R. Co.* 48 Fed. 243; *Greeley v. Lowe*, 155 U. S. 74, 39 L. ed. 75, 15 Sup. Ct. Rep. 24; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 366, 33 L. ed. 182, 9 Sup. Ct. Rep. 781; *Arndt v. Griggs*, 134 U. S. 327, 33 L. ed. 921, 10 Sup. Ct. Rep. 557; *United States v. Union P. R. Co.* 98 U. S. 604, 25 L. ed. 151.

## CHAPTER XVII.

### SECTION 8 APPLIED.

Thus, in brief, is shown the gradual extension of territorial jurisdiction, through the issuing and service of process, beginning in 1789, with the subpœna having no extraterritorial force, and the service of which must be made within the territorial jurisdiction of the Court (*Jewett v. Garrett*, 47 Fed. 630, 631; *Herndon v. Ridgeway*, 17 How. 425, 15 L. ed. 100; *Romaine v. Union Ins. Co.* 28 Fed. 639), and ending in 1875 with the power of the court to direct its process to any of the United States where the defendant may be found. This section does not enlarge the jurisdiction of the court, but only gives greater scope to its process, so as to exercise the jurisdiction given in section 1 of the judiciary act, by creating an exception to the rule that the defendant must be sued in the district of his residence.

Section 8 of the act of 1875 is as follows:

“That when in any suit commenced in any circuit court of the United States, to enforce any *legal* or *equitable* lien upon, or claim to, or to remove any encumbrance or lien or cloud upon title to *real* or *personal* property within the district where suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a certain day to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons, etc.” See sec. 57 of New Code, embodying sec. 8 of the act of 1875. (See Process.)

Under this section of the act and the statutes fixing the venue of suits of a local nature, the jurisdiction is determined by reason of the fact that the subject-matter of the suit or property

is within the jurisdiction of the courts and in the nature of a proceeding *in rem* (Shainwald v. Lewis, 5 Fed. 517; Ames v. Holderbaum, 42 Fed. 341; Lancaster v. Asheville Street R. Co. 90 Fed. 129; Hultberg v. Anderson, 170 Fed. 660; Cowell v. City Water Supply Co. 96 Fed. 770; Ladew v. Tennessee Copper Co. 179 Fed. 245; Jones v. Gould, 80 C. C. A. 1, 149 Fed. 153, S. C. 141 Fed. 698), and it matters not whether any or all of the plaintiffs, or any or all of the defendants, are resident citizens of the district of suit (Ibid.; Single v. Scott Paper Mfg. Co. 55 Fed. 555; Seybert v. Shamokin & Mt. C. Electric R. Co. 110 Fed. 811; Spencer v. Kansas City Stock-Yards Co. 56 Fed. 741; Greeley v. Lowe, 155 U. S. 58-73, 39 L. ed. 69-75, 15 Sup. Ct. Rep. 24; Deck v. Whitman, 96 Fed. 890; Gillis v. Downey, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 488, 489, 19 Mor. Min. Rep. 253; Ladew v. Tennessee Copper Co. supra); and where the case falls within section 8, then a citizen of one State may sue a citizen of another State in a third State (Single v. Scott Paper Mfg. Co. supra; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Grove v. Grove, 93 Fed. 869; De Hierapolis v. Lawrence, 99 Fed. 321; Carpenter v. Talbot, 33 Fed. 537). Again, where the case falls within the section, it may be at law, as ejectment (Spencer v. Kansas City Stock-Yards Co. supra), or in equity, as in foreclosing a lien or removing a cloud from title (Merrihew v. Fort, 98 Fed. 899; Ames v. Holderbaum, 42 Fed. 341; Cowell v. City Water-Supply Co. 96 Fed. 769; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Morrison v. Marker, 93 Fed. 692).

It has been held that a bill for specific performance comes under section 8, of the act of 1875, if the statutes of the State provide that a contract to convey land becomes a legal or equitable claim to or lien on the land, and if the relief provided by the statute permits publication to bring in absent or nonresident defendants, and a decree for the land can be entered. This is permitted in some States, and the United States courts will follow the State practice in this respect. Single v. Scott Paper Mfg. Co. 55 Fed. 553-556; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Bennett v. Fenton, supra. Otherwise a contract to convey land or specific property does not come under this clause, as it is a

personal action, and thus must be brought in the district of the residence of plaintiff or defendant. *Adams v. Heckscher*, 80 Fed. 742; *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954. It has also been held that a suit in equity to cancel a deed for fraud comes under this clause (*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. 781; *Evans v. Charles Scribner's Sons*, 58 Fed. 303); so to cancel a note (*Manning v. Berdan*, 132 Fed. 382).

Again, section 8 is applicable when the jurisdiction rests upon a Federal question, or in a suit that is ancillary where the property is in possession of the courts. *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285.

Section 8 also applies in partition. *Greeley v. Lowe*, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24. But it has been held not to apply to a suit to establish the ownership of stock in a corporation, as the situs of stock is with the nonresident holder. *Jellenik v. Huron Copper Min. Co.* 82 Fed. 778, see 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559, reversing the case, and holding, under section 8, the suit could be brought, and that the stock was to be deemed personal property within the district where the suit was brought, being the habitation of the corporation. This case was followed in *Jones v. Gould*, 141 Fed. 698.

### *Section 740 U. S. Rev. Stat.*

I now come to U. S. Rev. Stat. sec. 740, U. S. Comp. Stat. 1901, p. 587, embodied in sec. 52 of the New Judicial Code, creating another exception to the rule that the defendant must be sued in the district of his residence. This section provides that when a State contains more than one district, every suit not of a local nature must be brought, if one defendant, where the defendant resides; but if there be two or more defendants residing in different districts of the State, you may bring the suit in either district of the residence of one of the defendants, and a duplicate writ may be directed to the marshal of the other district for service. This was a part of the act of 1858, providing for service of process in local suits, already referred to.

It has been strenuously urged that, after the passage of sec-

tion 8, act of 1875, that section 740 was repealed, and that this section 8 specially retained in the act of 1888 had superseded all statutes prescribing the place where parties may be sued; and now section 8 is the only exception to the rule that a defendant can only be sued in the district whereof he is an inhabitant. *Greeley v. Lowe*, 155 U. S. 72-75, 39 L. ed. 74-76, 15 Sup. Ct. Rep. 24; *Cely v. Griffin*, 113 Fed. 981.

Judge Lacombe, of the southern district of New York, maintains the repeal of the act of 1858, sections 740-742, U. S. Rev. Stat., and would not permit service on nonresident defendants, except in the cases and under the conditions provided for in section 8 of the act of 1875. *New Jersey Steel & I. Co. v. Chormann*, 105 Fed. 532, 533; *Seybert v. Shamokin & Mt. C. Electric R. Co.* 110 Fed. 810.

In *Greeley v. Love*, *supra*, it is intimated that, as no exception was made in the act of 1875 for the cases provided for in sections 740, 742, U. S. Rev. Stat., it is at least open to doubt as to whether suits will lie against nonresident defendants under those sections. On the other hand, in *Goddard v. Mailler*, 80 Fed. 423, and *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L.R.A. 109, 49 Fed. 608, in comprehensive and well-reasoned opinions, the contrary view has been maintained.

The act of 1888 purports to cover the general and territorial jurisdiction of the Federal courts, and as it makes no provision for suing citizens of the same State living in different districts of the State, it tends to show that the legislative mind considered that this feature of Federal jurisdiction had been sufficiently provided for by section 740.

I submit the better reasoning is found in the cases which hold section 740 in force. *John D. Park & Sons Co. v. Bruen*, 133 Fed. 807. In *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 493, 50 L. ed. 285, 26 Sup. Ct. Rep. 133 the court below had dismissed the case for want of jurisdiction, as defendants did not reside in the district of Illinois in which the suit was brought. The plaintiff in error contended that the suit was brought under section 740, providing for service on defendants out of the district of suit, while the defendant in error contended that section 740 was repealed and the case was properly dismissed. The Supreme Court sustained the jurisdiction in the case because the Special Statutes creating the Fed-

eral districts in Illinois had provided, in the language of section 740, for service on defendants out of the district of suit, and therefore did not deem it necessary to decide whether section 740 had been repealed or not. There is nothing in its language bringing it in direct conflict with the present judiciary act of 1888, and therefore within the repealing clause 6 of that act (*Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *Third Nat. Bank v. Harrison*, 3 McCrary, 162, 8 Fed. 721), and we may read section 740 into the first section of the act, in all cases not of a local nature. But whatever may be the rule applied in other districts, it seems that in Texas, Congress has specially provided for service of process on defendants who do not reside in the district.

By an act of 1879, in rearranging the Federal districts in Texas, it was enacted that if there be more than one defendant, and they reside in different districts or in different divisions of the same district, the plaintiff may sue in either district, or division of the district, and may send duplicate writs to the other defendants, on which the plaintiff or his attorney shall indorse that the writ thus sent is a true copy of a writ sued out of the proper division. U. S. Rev. Stat. Supp. p. 417. The last clause was evidently a mistake, and not enforced, and subsequently corrected in 1902.

Again, by act of 1902, adding the southern district to the Federal districts of Texas, it is provided that if there be more than one defendant and they reside in different divisions of the district, or in different districts, the plaintiff may sue in either division of, or in either district, and send duplicate writs to the other defendants on which the clerk shall endorse, etc.

So that as to Texas, with her four Federal districts, subpoenas from any of her districts may run into any other district, or divisions of a district, if the conditions under the statute exist which permit it; that is, where there are two or more defendants residing in the different districts, or different divisions of a district, you may sue in either district or division of a district in which one of the defendants reside, and bring in all other defendants who are proper, necessary or indispensable parties. Acts Congress 1879 and 1902. Attention is

called to the special laws creating the Federal districts in Texas, because of the fact that Congress in creating Federal districts in other States has uniformly adopted the provisions of section 740 in providing for service on defendants out of the district of suit, and it was unquestionably decided in *Petri v. F. E. Creelman Lumber Co.* supra, that special laws creating new Federal districts, and providing for service on defendants out of the district of suit, were not repealed by the general jurisdictional acts, though in conflict 199 U. S. 498; *John D. Park & Sons Co. v. Bruen*, 133 Fed. 806; *Re Dunn*, 212 U. S. 388, 53 L. ed. 564, 29 Sup. Ct. Rep. 299.

But the general provisions of section 740 as re-enacted in section 52 of the new Federal Judicial Code, are now applicable to all districts, all previous laws creating or changing these districts having been expressly repealed by section 297 of such Code.

By the express provisions of sec. 297 of the New Judicial Code, "all acts and parts of acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing the times or places of holding court therein enacted prior to Feb. 1, 1911," are repealed.

And see sec. 53, chap. 4, New Code, requiring suit to be brought in the division of the district in which the defendant lives, or if he move, then one defendant residing in different divisions of the district the suit may be brought in either of the divisions and process served in all of the divisions.

By sec. 58, New Code, any suit may be transferred from one division to another. Effective January 1st, 1912.



## CHAPTER XVIII.

### WHERE A CORPORATION MAY BE SUED.

Having discussed the citizenship of corporations, and that under the jurisdictional act they are citizens, I will now discuss where they may be sued with reference to the State and district. The general rule is that a corporation must be sued in the State of its incorporation and in the district whereof it is an inhabitant; and within the jurisdictional act it is not considered a citizen, resident, or inhabitant of any State other than that in which it has been incorporated. *Wolff v. Choctaw O. & G. R. Co.* 133 Fed. 601; *United States v. Northern P. R. Co.* 67 C. C. A. 269, 134 Fed. 715; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 65; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 770; *Campbell v. Duluth, S. S. & A. R. Co.* 50 Fed. 241; *National Typographic Co. v. New York Typographic Co.* 44 Fed. 711; *Amsden v. Norwich Union F. Ins. Soc.* 44 Fed. 517.

If incorporated in several States, a citizen of each State of its incorporation cannot sue it in the Federal court of that State of which he is a citizen, but may sue it in a Federal court in a State of which he is a nonresident, *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 358; *Burger v. Grand Rapids & I. R. Co.* 22 Fed. 563; *Goodwin v. Boston & M. R. Co.* 127 Fed. 986; *Johnson v. Union P. R. Co.* 145 Fed. 252. But a railroad operated in several States by license or lease has no citizenship in such States, and may be sued by citizens of the States in which it so operates, in the Federal Courts. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 562, 563, 43 L. ed. 1086, 1087, 19 Sup. Ct. Rep. 817; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 677, 38 L. ed. 313, 14 Sup. Ct. Rep. 533; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Markwood v. Southern R. Co.* 65 Fed. 823; *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 22 U. S. App. 187, 61 Fed. 596, 597;

*Morgan v. East Tennessee & V. R. Co.* 48 Fed. 705. Such are the general rules as established since 1888.

Prior to the passage of the judiciary act of that year, a corporation could be sued in any State where found; that is, in any State where it accepted the conditions prescribed by the State and had by its agents established its business. *Hayden v. Androscoggin Mills*, 1 Fed. 93-95; *Ex parte Schollenberger*, 96 U. S. 375, 376, 24 L. ed. 854; *United States v. Southern P. R. Co.* 49 Fed. 302; *Southern P. Co. v. Denton*, 146 U. S. 207, 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Re Keasbey & M. Co.* 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273, and authorities cited; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 707; *United States v. S. P. Shotter Co.* 110 Fed. 2.

By the act of 1888, we have seen, the words of the previous judiciary act, to wit, "or in which he shall be found at the time of serving process or commencing proceedings," were repealed, and the following language substituted: "But when the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of plaintiff or defendant." So that now we have established both as to corporations as well as individuals, that if jurisdiction be founded on the diversity of citizenship, the plaintiff, whether an individual or a corporation (*Central Trust Co. v. Virginia, T. & C. Steele & I. Co.* 55 Fed. 773; *Empire Coal & Transp. Co. v. Empire Coal & Min. Co.* 150 U. S. 164, 37 L. ed. 1039, 14 Sup. Ct. Rep. 66), can sue a nonresident corporation either in plaintiff's district, when the defendant corporation is doing business in the State (*United States v. Bell Teleph. Co.* 29 Fed. 17), or in the State and district of which defendant corporation is an inhabitant, which, as we have seen, can only be the State of its organization. *Wolff v. Choctaw R. Co.* 133 Fed. 602; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705-707; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 66; *N. K. Fairbank & Co. v. Cincinnati*,

N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421; *Dinzy v. Illinois C. R. Co.* 61 Fed. 51; *Minford v. Old Dominion S. S. Co.* 48 Fed. 1.

From the above authorities we have the rule briefly stated as follows: A nonresident corporation cannot be sued in the Federal courts, without its consent, in a State in which it is merely doing business (*Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 771, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44), except by a citizen of that State in the district of which he is an inhabitant; or, to state the rule more fully. A corporation incorporated in one of the States of the Union cannot be compelled to answer to a civil suit at law or in equity in a circuit court of the United States held in another State or district, even if the corporation has a usual place of business in that district, unless the plaintiff is a citizen and resident of the district. *Ibid.*; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 204, 37 L. ed. 703, 13 Sup. Ct. Rep. 859; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 136, 137; *Galveston H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401; *Wange v. Public Service R. Co.* 159 Fed. 190; *Haight & F. Co. v. Weiss*, 84 C. C. A. 224, 156 Fed. 328. Bear in mind, this rule only applies when jurisdiction depends on diversity of citizenship; on any other ground, as the existence of a Federal question, the corporation can only be sued, without its consent, in the Federal courts in the State of its incorporation and district of its habitation. *Ibid.*; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287, 288; *Cramer v. Singer Mfg. Co.* 59 Fed. 75; *Re Keasbey & M. Co.* 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 273; *Shaw v. Quincy Min. Co.* 145 U. S. 449, 36 L. ed. 771, 12 Sup. Ct. Rep. 935. The provision of the judiciary act fixing venue as above set forth is not fundamental, or essential to the exercise of judicial power by the Federal courts, and therefore a corporation sued in the Federal courts of any State may by general appearance waive the right to object that the suit is not brought in a district of its, or the plaintiff's, residence. *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 219, 40 L. ed. 401, 16 Sup.

Ct. Rep. 272; Southern P. Co. v. Denton, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982.

In *United States v. American Bell Teleph. Co.* 29 Fed. 17, and *Mecke v. Valley Town Mineral Co.* 89 Fed. 114, it was held that, in the absence of a voluntary appearance, three conditions must concur in order to give a Federal court jurisdiction *in personam* over a corporation in a State other than of its organization.

First. It must appear that the defendant corporation is carrying on business in such State or district where suit is brought. *Barnes v. Western U. Teleg. Co.* 120 Fed. 550; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Boardman v. S. S. McClure Co.* 123 Fed. 614; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 263, and authorities cited. *Audenreid v. East Coast Mill. Co.* 124 Fed. 697.

Second. That it is managed by some officer or agent appointed by and representing the corporation in such State. *Ibid.*

Third. The existence of some local law making foreign corporations generally amenable to suit in the State as a condition precedent to doing business in the State, either express or implied. *Williams v. Gold Hill Co.* 96 Fed. 457; *Dinzy v. Illinois C. R. Co.* 61 Fed. 49; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Berry v. Knights Templars' & M. Life Indemnity Co.* 46 Fed. 441; *Hill v. Empire State-Idaho Min. & Developing Co.* 156 Fed. 797; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 157, 47 L. ed. 994, 23 Sup. Ct. Rep. 707; *Barron v. Burnside*, 121 U. S. 200, 30 L. ed. 919, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 10, 26 L. ed. 644; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Ex parte Schollenberger*, *supra*; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 358.

Under this third ground it may be stated that the States, in fixing the conditions under which foreign corporations can do

business, generally providing for issuing process, and service on foreign corporations. It may be further stated as to the third condition, that the statutes of States cannot abridge or impair the jurisdiction of Federal courts over foreign corporations (*Blodgett v. Lanyon Zinc Co.* 58 C. C. A. 79, 120 Fed. 894); that no limitation of suability fixed in such local statutes can affect Federal jurisdiction, it otherwise appearing (*Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526), and while Federal courts will follow the statutory conditions of States, it will not be bound by them, if in their opinion they obstruct the due administration of justice, or are in conflict with the constitution and laws of the United States. *Barron v. Burnside*, *supra*; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. 896; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 151 Fed. 874; *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 18; *Colby v. Cleaver*, 169 Fed. 206, 207. In a word, such statutes are not essential to the jurisdiction of the Federal court. *Barrow S. S. Co. v. Kane*, *supra*; *Wilson Packing Co. v. Hunter*, 8 Biss. 429, Fed. Cas. No. 17, 852.

Let us now illustrate the rules as above stated. In *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44, jurisdiction rested upon diversity of citizenship. *Denton*, a citizen of Red River county in Texas, and therefore an inhabitant of the Eastern District of Texas, sued the Southern Pacific Railway Company, a Kentucky corporation, in the United States court at Austin, which is in the western district of Texas, alleging that the defendant was doing business in the western district of Texas, having an agent there, one Jessup, etc. The corporation filed a demurrer to the jurisdiction, thus admitting the facts, but claiming that no jurisdiction was shown. The Supreme Court of the United States sustained the demurrer, holding that since the act of 1888 had repealed the provision in the act of 1875, permitting suit where the defendant may be found, and required the suit to be brought in the district in which plaintiff was an inhabitant, or in the district and State of which defendant was an inhabitant (in this case Kentucky) that the suit in this case could only have been brought in the eastern district of Texas or in Kentucky. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct.

Rep. 935; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 545; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 707; *Stonega Coal & Coke Co. v. Louisville & M. R. Co.* 139 Fed. 271, 272. The contention was that doing business in the western district of Texas, and having an agent there, was equivalent to consenting to be sued in the western district, under the statute of 1887 of Texas, requiring a foreign corporation transacting business in Texas to file with the secretary of state a certified copy of its articles of incorporation, and authorizing service of process on any of its agents and officers in the State.

The Supreme Court said that such a statute might subject the corporation to suit in any of the districts under the statutes of 1789 and 1875 (*Ex parte Schollenberger*, 96 U. S. 375, 24 L. ed. 854; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 706, 707; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138-146, 28 L. ed. 379-382, 4 Sup. Ct. Rep. 364), but such an agreement between the State and corporation since 1888, as interpreted in *Shaw v. Quincy Min. Co.* *supra*, could not compel the defendant to be sued other than in the State and district of its residence, or the residence of the plaintiff. *Ibid.*; *Southern P. Co. v. Denton*, 146 U. S. 208, 36 L. ed. 945, 13 Sup. Ct. Rep. 44. See *Wange v. Public Service R. Co.* 159 Fed. 190.

The case of *Shaw v. Quincy Min. Co.* *supra*, referred to, raised the question whether a nonresident could sue a corporation doing business in the State where sued, such corporation being chartered by and a citizen of another State. The plea to the jurisdiction was sustained because it presented a case where neither plaintiff or defendant were citizens of the State of suit.

You will find in *Zambrino v. Galveston, H. & S. A. R. Co.* 38 Fed. 449, and in *Riddle v. New York, L. E. & W. R. Co.* 39 Fed. 290, both cases tried shortly after the act of 1888 was passed, it was held that a foreign corporation could be sued in the district of a State in which it was doing business through its agents; but in *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. 66; *Booth v. St. Louis Fire Engine Mfg. Co.* 40 Fed. 1; *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 695, and *National Typographic Co. v. New York Typographic Co.* 44 Fed.

711, a different conclusion was reached, which conclusion was sustained by the Supreme Court in the cases above referred to.

*What District is the Domicil of a Corporation.*

But the question often arises, when a corporation is "doing business" in various Federal districts of a State, as to which of the districts it is an inhabitant. The rule may be stated, that it is an inhabitant of the district in which it has its principal office or headquarters, and having its principal office in one district, it cannot be considered an inhabitant of another Federal district. *Re Dunn*, 212 U. S. 375, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; *Weed v. Centre & C. Street R. Co.* 132 Fed. 151; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 601; *Galveston, H. & S. A. R. Co. v. Gonzales*, *supra*; *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 818; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co.* 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421; *Weller v. Pennsylvania R. Co.* 113 Fed. 503. Thus, in *Galveston, H. & S. A. R. Co. v. Gonzales*, *supra*, it was held that a corporation organized under the laws of a State in which there are four Federal districts, and having its principal office in one of the districts, must be sued there, though it operates its line of railway through the other districts; and this rule applies whether the suit be brought by an alien or nonresident.

## CHAPTER XIX.

### DOING BUSINESS.

A foreign corporation to be sued in a State other than the State of its organization must be "doing business" in the State where sued. *Green v. Chicago, B. & Q. R. Co.* 147 Fed. 767; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 255, 53 L. ed. 787, 29 Sup. Ct. Rep. 445, and authorities cited; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 263, and authorities cited; *Boardman v. S. S. McClure Co.* 123 Fed. 614; *Kibbler v. St. Louis & S. F. R. Co.* 147 Fed. 832. (See service of process on corporations.) If not "doing business," legal service cannot be had, even though State laws authorize it. *Ibid.*; *Swann v. Mutual Reserve Fund Life Asso.* *supra*; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 130; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807. See also *Barrow S. S. Co. v. Kane*, *supra*.

This question is one of general, not local, law. *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Barrow S. S. Co. v. Kane*, *supra*. A State may prescribe conditions, except as to interstate matters, permitting business, but it cannot prescribe in advance what acts will be considered as doing business. *Ibid.*; *Cyclone Min. Co. v. Baker Light & P. Co.* 165 Fed. 996; *Tennis Bros. Co. v. Wetzel & T. R. Co.* 140 Fed. 196. It is therefore sometimes difficult to determine whether a foreign corporation is doing business in a State so that it



may be sued there, and I can only suggest through illustration when service can be perfected so as to give jurisdiction on a foreign corporation in another State. A New York corporation collecting and distributing news, but with no office or place of business in a State, is not doing business (*Evansville Courier Co. v. United Press*, 74 Fed. 918), but a paper having an agent in another State soliciting advertisements and making contracts can be sued by service on such agent (*Palmer v. Chicago Herald Co.* 70 Fed. 886). A bank receiving premiums due to an insurance company for the convenience of policy holders does not constitute doing business so as to be bound by service on the officers of the bank. *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 923; *Cooper v. Brazelton*, 68 C. C. A. 188, 135 Fed. 476. A corporation selling goods through a drummer does not make service on the drummer good. *American Wooden-Ware Co. v. Stem*, 63 Fed. 676. But a manufacturing corporation outside of the State where sued, employing another corporation to sell goods for them, is doing business in such State, and service on its agents is good. *Cone v. Tuscaloosa Mfg. Co.* 76 Fed. 891; *United States Rubber Co. v. Butler Bros. Shoe Co.* 132 Fed. 398. Lending money in a State by a foreign corporation to one who contracts to pay in the foreign State is not doing business so that service would be good in the State where the money is loaned. *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 595; *Cæsar v. Capell*, 83 Fed. 412-414. Collecting dues, premiums, and assessments on policies in a State is doing business, though State license is withdrawn. *Mutual Reserve Fund Life Asso. v. Phelps*, 199 U. S. 157, 47 L. ed. 994, 23 Sup. Ct. Rep. 707; *Sparks v. National Masonic Acci. Asso.* 73 Fed. 285; *Connecticut Mut. L. Ins. Co. v. Spratley*, *supra*. Effecting insurance through correspondence is not doing business. *Hazeltine v. Mississippi Valley F. Ins. Co.* 55 Fed. 749; *Good Hope Co. v. Railway Barb Fencing Co.* 23 Blatchf. 43, 22 Fed. 637. A railroad company having no tracks in the district is not doing business because it hires an office and maintains an agent in the district to solicit business. *Green v. Chicago, B. & Q. R. Co.* 205 U. S. 530, 534, 51 L. ed. 916, 917, 27 Sup. Ct. Rep. 595, and authorities cited. *Goepfert v. Compagnie Generale Transatlantique*, 156 Fed. 196. So, having an agent in a State  
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soliciting orders for a foreign manufacturer, but not making contracts, is not doing business within the rule permitting service of process to be made. *Fawkes v. American Motor Car Sales Co.* 176 Fed. 1010; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 293, 7 A. & E. Ann. Cas. 219. So sales of goods by a foreign corporation through salesmen to citizens of another State, belonging to the operation of interstate commerce, are not affected by restrictive laws of the States requiring conditions precedent to "doing business" in a State. *Kirven v. Virginia-Carolina Chemical Co.* supra; *Julius Kessler & Co. v. Perilloux*, 127 Fed. 1011. However, it is held that the interstate commerce clause does not apply to a foreign corporation maintaining a continuous agency in a State from which orders are solicited and the goods delivered to purchasers. *Diamond Glue Co. v. United States Glue Co.* 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206.

Nor are isolated contracts of this character between individuals of a State and foreign corporations "doing business" in the State. *Kirven v. Virginia-Carolina Chemical Co.* supra; *Oakland Sugar Mill Co. v. Fred W. Wolf Co.* 55 C. C. A. 93, 118 Fed. 239; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 734, 28 L. ed. 1139, 5 Sup. Ct. Rep. 739; *Frawley v. Pennsylvania Casualty Co.* supra; *Allgeyer v. Louisiana*, 165 U. S. 592, 41 L. ed. 836, 17 Sup. Ct. Rep. 427; *Cæsar v. Capell*, 83 Fed. 409, 413; *Clews v. Woodstock Iron Co.* 44 Fed. 31; *Hazeltine v. Mississippi Valley F. Ins. Co.* supra; *Gilchrist v. Helena, H. S. & S. R. Co.* 47 Fed. 593; *Good Hope Co. v. Railway Barb Fencing Co.* supra; *Robinson v. American Linseed Co.* 147 Fed. 886.

It has been stated as a test, that if a corporation of one State engages in business in another State under such circumstances that by the law of the latter State the corporation may be sued in the courts thereof, then it may be sued in the Federal courts in that State, if the case would be otherwise within the Federal jurisdiction. *Dinzey v. Illinois C. R. Co.* 61 Fed. 51; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 81, 20 L. ed. 358; *Ex parte Schollenberger*, 96 U. S. 375, 24 L. ed. 854.

Corporations doing business in a State other than that of its incorporation can only be sued in a Federal court by citizens of that State, and not by citizens of another State. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *St. Louis R. Co. v. Pacific R. Co.* 52 Fed. 771; *Adriance, P. & Co. v. McCormick Harvesting Mach. Co.* 55 Fed. 287; *Central Trust Co. v. Virginia, T. & C. Steel & I. Co.* 55 Fed. 769; *Southern P. Co. v. Denton*, 146 U. S. 205, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Central Trust Co. v. McGeorge*, 151 U. S. 134, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; *Re Keasbey & M. Co.* 160 U. S. 228, 229, 40 L. ed. 404, 405, 16 Sup. Ct. Rep. 273. Neither nonresidents nor aliens can thus sue a foreign corporation, whether doing business in the State or not, out of the State of its incorporation. *Denton v. International Co.* 36 Fed. 1; *Campbell v. Duluth S. S. & A. R. Co.* 50 Fed. 241, 242; *Re Hohorst*, 150 U. S. 662, 37 L. ed. 1214, 14 Sup. Ct. Rep. 221; *National Typographic Co. v. New York Typographic Co.* 44 Fed. 711; *Gormully & J. Mfg. Co. v. Pope Mfg. Co.* 34 Fed. 820; *Filli v. Delaware, L. & W. R. Co.* 37 Fed. 65; *Barlow v. Chicago & N. W. R. Co.* 164 Fed. 768.

### *Alien Corporations.*

What has hitherto been said about "foreign" corporations and the rules applicable to jurisdiction over them applies wholly to corporations created and organized under the authority and laws of one of the United States "doing business" in another State than that of its organization. I come now to speak of the rules of jurisdiction applicable to "alien" corporations, or such as have been organized under the laws of a foreign country, "doing business" in the United States through its agencies.

Alien corporations are not citizens of or inhabitants of any State within the jurisdictional acts (*Shaw v. Quincy Min. Co.* 145 U. S. 453, 36 L. ed. 772, 12 Sup. Ct. Rep. 935), and therefore jurisdiction cannot be based on diversity of citizenship, but under the provision of the statute giving jurisdiction where there shall be a controversy between citizens of a State and foreign States, citizens or subjects. The provision of the

statute providing the place of suit does not apply to aliens, and therefore they may be sued in any Federal district where they may be found.

In *Barrows S. S. Co. v. Kane*, 170 U. S. 103, 42 L. ed. 965, 18 Sup. Ct. Rep. 526, an action was brought in the circuit court of the United States for the Southern District of New York by Kane, a citizen of New Jersey, against the steamship company, a corporation of Great Britain, for injuries received as a passenger on a voyage from Ireland. The contention was that, being a corporation organized in Great Britain, no suit *in personam* could be brought in this country without its consent. That the statutes of New York made no provision for nor conferred on any court the power to issue process in an action by a nonresident; therefore the circuit court of the United States could acquire no jurisdiction; that is, a citizen of New Jersey could not bring in a Federal court in New York a suit against an alien corporation. The corporation had an agent, an office in New York city, upon whom service was made. The court answering the contention said:

First. That the courts of the United States were not dependent on State statutes for perfecting service and acquiring jurisdiction.

Second. That the conferring of jurisdiction by the Constitution where citizens and aliens had a controversy was sufficient to support the process and judgment.

Third. That, the defendant being an alien corporation, the subsequent provisions of the judiciary act of 1888, providing for the place of suit, did not apply, and therefore an "*alien*" can be sued in any district in which valid service can be made or where found. *Re Hohorst*, *supra*; *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 497, 38 L. ed. 248, 14 Sup. Ct. Rep. 401. See *Service of Process on Corporations*.

## CHAPTER XX.

### WAIVER OF JURISDICTION.

In closing the subject as to the *locus* of the suit, I wish again to state that the right or privilege to be sued in the district of which one is an inhabitant is not jurisdictional in the sense of being fundamental. If the jurisdiction of the Federal court otherwise exists, then as to where the suit shall be brought may be waived by entering a general appearance or by answer.

It is a personal exemption to be pleaded in order to be available (*St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Baltimore & O. R. Co. v. Doty*, 67 C. C. A. 38, 133 Fed. 869; *Burch v. Southern P. Co.* 139 Fed. 350; *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705; *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 8, and authorities cited; *United States Fidelity Co. v. Woodson County*, 76 C. C. A. 114, 145 Fed. 144; *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 260; *Ex parte Schollenberger*, 96 U. S. 378, 24 L. ed. 855; *Rodgers v. Pitt*, 96 Fed. 676, and authorities cited; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 847); but where it is apparent in the bill a demurrer is sufficient, and it is not necessary to file a plea in abatement (*Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179).

### *Acts of Waiver.*

A general appearance by defendant, whether individual or corporation, waives the privilege (*Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 219, 220, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272; *Central Trust Co. v. McGeorge*, 151 U. S. 133, 134, 38 L. ed. 100, 101, 14 Sup. Ct. Rep. 286; *McPhee*

& McG. Co. v. Union P. R. Co. *supra*; *Re Moore*, 209 U. S. 506, 507, 52 L. ed. 911, 912, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164; *Marks v. Marks*, 75 Fed. 332; *Rodgers v. Pitt*, 96 Fed. 676, 677, and authorities cited; *Southern P. Co. v. Denton*, *supra*; *Texas & P. R. Co. v. Cox*, 145 U. S. 603, 36 L. ed. 832, 12 Sup. Ct. Rep. 905. See *Reinstadler v. Reeves*, 33 Fed. 308, for exceptions. *Smith v. Lyon*, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303); or by pleading to the merits (*Ibid.*; *Southern Exp. Co. v. Todd*, 5 C. C. A. 432, 12 U. S. App. 351, 56 Fed. 104; *Collins v. Stott*, 76 Fed. 613; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 810; *Carter-Crume Co. v. Peurrung*, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 442; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Van Doren v. Pennsylvania R. Co.* *supra*; *Midland Contracting Co. v. Toledo Foundry & Mach. Co.* 83 C. C. A. 439, 154 Fed. 798; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 850; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477). A demurrer to the bill waives. *Ibid.*; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 130, 35 L. ed. 660, 11 Sup. Ct. Rep. 982; *Scott v. Hoover*, 99 Fed. 247. As a general demurrer to the bill goes to merit. *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 817. If the demurrer raises the issue that the bill shows on its face want of jurisdiction, then it does not waive. *Southern P. Co. v. Denton*, *supra*; *Shaw v. Quincy Min. Co.* 145 U. S. 453, 36 L. ed. 772, 12 Sup. Ct. Rep. 935. And where the demurrer is overruled, answering over does not waive right to object to jurisdiction on appeal. *Southern P. Co. v. Denton*, *supra*; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 272. The rule, then, is that the failure of defendant to present the issue as to want of jurisdiction by plea, demurrer, or answer before filing an answer to the merits is a waiver of jurisdiction of the court, because of being sued in the wrong district. *Less v. English*, *supra*, and authorities; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272.

### *Taking of Depositions as Waiver.*

In *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 271, it was held that defendant did not waive objection

to jurisdiction by appearing and participating in taking depositions on the suit before issues made up (*Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539), but not where the case has proceeded beyond the pleading.

### *Removal as Waiver.*

A petition for removal, and bond duly filed waives the right to challenge the jurisdiction of the court on the ground of not filing the suit in the district of which the defendant is an inhabitant. *Creagh v. Equitable Life*, 83 Fed. 851; *Gregory v. Pike*, 67 Fed. 847; *Sherwood v. Newport News Co.* 55 Fed. 4 (see "Removals").

### *Who may Object.*

When there are several defendants, some of whom are not inhabitants of the district in which suit is brought, the question has arisen whether the defendants who are inhabitants of the district may not take the objection that others are not. The rule may be stated that the resident defendant cannot object, that his codefendant is sued out of his district. *Smith v. Atchison T. & S. F. R. Co.* 64 Fed. 1; *Jewett v. Bradford Sav. Bank & T. Co.* 45 Fed. 801. The joinder is not jurisdictional unless the nonresident chooses to make it so. *Schultz v. Highland Gold Mines Co.* 158 Fed. 341; *Dominion Nat. Bank v. Olympia Cotton Mills*, 128 Fed. 182; *Lowry v. Tile, Mantel & Grate Asso.* supra. It is intimated in *Interior Constr. Co. v. Gibney*, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272, that under certain conditions the resident defendant may object to answering without the presence of the nonresident indispensable party. *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 77, id., 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 252; *Blanchard v. Bigelow*, 109 Fed. 275; *Continental Adjustment Co. v. Cook*, 152 Fed. 655.

## CHAPTER XXI.

### HOW ISSUE OF CITIZENSHIP RAISED AND PROOF THEREON.

If the diversity of citizenship is not apparent, the issue can be raised by demurrer; if apparent, but not true, it may be raised by plea or answer. To properly understand how to formulate the plea or answer, and the character of proof necessary, we must bear in mind that citizenship, so far as the jurisdictional act is concerned, must be that character of citizenship that identifies itself with a *particular State*; and citizenship as defined in the 14th Amendment to the Constitution of the United States does not affect the rule. *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Marks v. Marks*, 75 Fed. 324.

Again, you must distinguish between judicial and political citizenship. *Marks v. Marks*, 75 Fed. 327-332. As soon as a citizen moves to a State *animo manendi*, he becomes a judicial citizen, and may sue or be sued instanter in a Federal court and in the Federal district in which he may for the time reside, though he cannot vote. For jurisdictional purposes, then, citizenship requires: First, residence; second, intention of permanency.

State citizenship and "domicil" are the same thing (*Marks v. Marks*, 75 Fed. 324; *Alabama G. S. R. Co. v. Carroll*, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780); for domicil means residence *animo manendi*. *Collins v. Ashland*, 112 Fed. 178; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 543; *Harton v. Hawley*, 155 Fed. 493; *Marks v. Marks*, 75 Fed. 331. Residence may exist *animo revertendi*, and for this reason the allegation of residence, as will hereafter be seen, is not sufficient. Citizenship and residence are not convertible terms. *Sharon v. Hill*, 26 Fed. 337-342; *Rob-*



ertson v. Cease, 97 U. S. 648, 24 L. ed. 1058; Pacific Mut. L. Ins. Co. v. Tompkins, *supra*, and authorities cited; Steigleder v. McQuesten, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; Chambers v. Prince, 75 Fed. 177; McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 579; Eisele v. Oddie, 128 Fed. 945; Jones v. Subera, 150 Fed. 464; Menard v. Goggan, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; Horne v. George H. Hammond Co. 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602. A person may have several residences, but only one domicile. Tambrino v. Galveston, H. & S. A. R. Co. 38 Fed. 453, and authorities cited. "Residence," however, is an element of citizenship. McDonald v. Salem Capital Flour-Mills Co. 31 Fed. 577; Anderson v. Watt, 138 U. S. 695, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449. See Robertson v. Cease, *supra*.

### *Burden of Proof.*

The burden of proof is on the defendant to defeat jurisdiction when the issue is raised. Foster v. Cleveland, C. C. & St. L. R. Co. 56 Fed. 436; Collins v. Ashland, *supra*; National Masonic Acci. Asso. v. Sparks, 28 C. C. A. 399, 49 U. S. App. 681, 83 Fed. 225; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801; Alabama G. S. R. Co. v. Carroll, 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 779, 780; Rucker v. Bolles, 25 C. C. A. 600, 49 U. S. App. 358, 80 Fed. 504; Hartog v. Memory, 116 U. S. 590, 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521. (See "Plea, Burden of Proof".)

### *How the Issue is Raised.*

With these observations as to the character of citizenship necessary to jurisdiction, I will proceed to discuss how the issue is raised and proved.

It will be seen, in discussing the bill in equity, that the diversity of citizenship must appear in the bill with certainty, as it will not be inferred from allegations. International Bank & T. Co. v. Scott, 86 C. C. A. 248, 159 Fed. 59; Boston Safe-Deposit & T. Co. v. Racine, 97 Fed. 817; Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268; Continental L. Ins. Co. v. Rhoads, 119 U. S. 239, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Anderson v. Watt, 138 U. S. 702, 34 L. ed. 1081,

11 Sup. Ct. Rep. 449; *Timmons v. Elytown Land Co.* 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Roberts v. Lewis*, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781. If it does not appear the appellate courts presume the court below acted without jurisdiction. *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; *Horne v. George H. Hammond Co.* 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 167. If it does not so appear in the bill, you may demur (*Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44), plead, or move to dismiss (*Tice v. Hurley*, 145 Fed. 391; *Sanbo v. Union P. Coal Co.* 146 Fed. 80; *Robertson v. Cease*, *supra*; *Miller-Magee Co. v. Carpenter*, 34 Fed. 433). Being fundamental, there is no particular or exclusive way of raising the issue. *Adams v. Shirk*, 55 C. C. A. 25, 117 Fed. 801; *Collins v. Ashland*, 112 Fed. 175. Or it may be raised by motion when clearly apparent in the record. *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.* 181 Fed. 974; *Lader v. Tennessee Copper Co.* 179 Fed. 245; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616. See *Wright v. Skinner*, 136 Fed. 694, suggesting that a motion is the only proper way under equity rule 20.

### *Raising Issue by Demurrer.*

The demurrer or motion is based purely on the record, and is a sufficient suggestion to the court of its want of jurisdiction. If a demurrer can be filed it should be in the following form:

A. B. } vs.    } C. D. }	In Equity.	In Circuit Court of the United States for the.....District of .....,sitting at .....
Title as in bill.		

The demurrer of C. D., defendant (or the joint and several demurrer of C. D. and E. F., defendants).

This defendant (or these defendants), not confessing all or any of the matters in the bill of complaint to be true, as herein alleged, demurs to said bill, and for cause of demurrer shows that it appears from said bill that jurisdiction of this court is dependent on diversity of citizenship, and that said diversity is not shown, for that plaintiff and defendant, or

one of the defendants (naming him), are, as appears, citizens of the same, and not different States (or that it appears that both plaintiff and defendant are aliens; or that there are aliens on both sides of the controversy with citizens of States; or that neither plaintiff or defendant are citizens of the State in which suit is brought; or citizens of the same State suing in a third State, or two or more citizens of different States suing a defendant from a third State, or any other form of objection to the fact of the bill appearing under the rules of jurisdiction heretofore given; but be specific in your statement).

Wherefore defendant (or defendants) prays the judgment of the court whether he shall be compelled to answer further said bill, and further prays to be dismissed with his costs, etc.

R. F.,  
Solicitor, etc.

See form, *Stonega Coal & Coke Co. v. Louisville & N. R. Co.* 139 Fed. 271.

The demurrer, to be available, must be certified to by counsel, and sworn to by the defendant, as will be shown hereafter under "Demurrer." The demurrer, of course, is tried by the record. But the record may show a sufficient allegation of diversity of citizenship, which allegation may be untrue; when this is the case, you must raise the issue by plea, as a proper allegation of citizenship is confessed if not denied. *Hoppenstedt v. Fuller*, 17 C. C. A. 623, 36 U. S. App. 271, 71 Fed. 99. In *Crown Cork & Seal Co. v. Standard Brewery*, 174 Fed. 252, it is said that a proper allegation of citizenship, though denied in the answer, is admitted unless a plea is filed. This is true in equity, whatever it may be at law, citing equity rule 39. *Butchers' & D. Stockyards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35-40; *Desert King Min. Co. v. Wedekind*, 110 Fed. 873-877, and authorities cited. *Sharon v. Hill*, 26 Fed. 723. See *Jenkins v. York Cliffs Improv. Co.* 110 Fed. 807, and *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Stichtenoth v. Central Stock & Grain Exch.* 99 Fed. 1; *York County Sav. Bank v. Abbot*, 131 Fed. 980; *Klenk v. Byrne*, 143 Fed. 1008.

### *Raising Issue by Plea.*

As said above, where the record sufficiently alleges citizenship, but the allegations are not true, then you may raise the

issue by plea or answer. If by plea, it should be in the following form:

The title as in bill; heading as in the demurrer.

*(Plea to Jurisdiction.)*

The plea of C. D., defendant (or the joint and several plea of C. D. and E. F., defendants in the above cause), to the bill of complaint.

This defendant (or these defendants) not confessing any or all of the matters in the said bill to be true, as therein alleged, for plea to said bill aver and say, that it appears from said bill that the jurisdiction of the court is dependent on diversity of citizenship of the parties to the suit, and that so much of the allegations of said bill as avers said diversity of citizenship is not true, for defendant avers that the plaintiff, A. B., is not a citizen or resident of the State of....., as alleged by him, but was at the commencement of this suit, and is now, a citizen and resident of the State of....., of which State the defendant C. D. or E. F. was at the commencement of this suit a citizen and resident (or that plaintiff and defendant are citizens of different States from the one in which the suit is brought, or allege in the plea that one of the plaintiffs and one of the defendants have such citizenship as would defeat jurisdiction, under the rules given, if their citizenship had been truthfully alleged, or any other grounds of objection you can prove as to citizenship or parties affecting the jurisdiction in the Federal court.)

All of which matters and things this defendant or these defendants aver to be true and plead the same in bar of complainant's bill, and pray the judgment of the court whether they shall be compelled to further answer said bill, and pray to be hence dismissed with costs.

R. F.,

Solicitor, etc.

The plea, like the demurrer, must be certified to by counsel and sworn to by the defendant, as will be explained under "Plea."

If the defendant be a corporation, this form may be used:

Title and commencement as before.

And now comes the C. D. Company, defendant in the above cause, and appearing for the purpose of this plea says that it is not a corporation organized under the laws of the State of....., nor is it a citizen of the State of.....or inhabitant thereof, nor does it reside therein; but it is a corporation organized under the laws of the State of....., and an inhabitant and citizen of said State of....., and in the..... district of....., where the corporate meetings are held and the corporate business transacted, and defendant doth further aver that it appears from said bill that jurisdiction is dependent on diversity of citizenship and it is not true as averred, that plaintiff is a citizen of the State of....., as alleged by him, but was at the commencement of this suit, and now is, a citizen and resident of the State of....., being the same State of

defendant's residence as alleged aforesaid (or that plaintiff is a certain citizen and resident of the.....district of ....., and not of the .....district of.....) where this suit is brought (or any fact which shows want of diversity of citizenship as by the rules heretofore is necessary to jurisdiction by diversity of citizenship). All of which matters and things this defendant avers to be true, and pleads the same in bar of this suit, and prays the judgment of the court whether it shall be compelled to further answer said bill, and prays to be hence dismissed with costs.

To be signed, certified, and sworn to as above.

If the objection be that plaintiff is not suing the foreign corporation in the district of plaintiff's residence, then say, after "defendant does further aver that it appears from said bill that jurisdiction depends on diversity of citizenship," the following:

That it is not true that plaintiff at the commencement of this suit was, nor now is, a resident and citizen of the.....district of ....., where this suit is brought, but he was at the commencement of this suit, and now is, a citizen and resident of the.....district of ....., all of which matters and things this defendant alleges to be true, wherefore he says not this court, but the Circuit Court of the United States for the.....district of ....., of which plaintiff is a citizen and inhabitant, has jurisdiction, and not this court. After prayer to be dismissed, sign, certify and verify the plea.

The plea tendering the issue of fact must be met by replication by the plaintiff, as will be more fully explained under "Replication," after which the issue is said to be joined. Evidence must then be taken by deposition upon the issue and set down for hearing, as will also be explained hereafter. If the issue is made by the answer, then the evidence on jurisdiction is taken in connection with the evidence on the merits of the whole case, and the issue may be submitted with the whole case on final hearing. The court generally determines the issue of jurisdiction at once, and it is better to submit it in advance of the issues on the merits, as it saves time and expense.

### *Issue of Citizenship and Burden of Proof under Plea.*

As said above, when citizenship is properly alleged in the bill, but it is desired to show the allegations untrue, it is better to raise the issue by plea and have the matter decided be-

fore going into the merits. *Gaddie v. Mann*, 147 Fed. 955-959. See *Kilgore v. Norman*, 119 Fed. 1008; *Stichtenoth v. Central Stock & Grain Exch.* *supra*.

*Burden of Proof.*

As before said, the burden of proof is on the defendant to prove to a "legal certainty" facts relied upon to defeat the jurisdiction. *Ibid.*; *Wiemer v. Louisville Water Co.* 130 Fed. 244; *Adams v. Shirk*, *supra*; *Chambers v. Prince*, 75 Fed. 176, fact cases; *Canadian P. R. Co. v. Wenham*, 146 Fed. 207; *Marks v. Marks*, 75 Fed. 324; *Collins v. Ashland*, 112 Fed. 175; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 817; *Southern Electric R. Co. v. Hageman*, 57 C. C. A. 348, 121 Fed. 262; *Loomis v. Rosenthal*, 67 Fed. 369; *Covel v. Chicago, R. I. & P. R. Co.* 123 Fed. 452; *Illinois L. Ins. Co. v. Shenehon*, 109 Fed. 674; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539; *Caldwell v. Firth*, 33 C. C. A. 439, 62 U. S. App. 594, 91 Fed. 177; *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 1; *Denver v. Sherrett*, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226; *Rucker v. Bolles*, *supra*; *Kingman v. Holthaus*, 59 Fed. 305, 309.

## CHAPTER XXII.

### WANT OF NECESSARY CITIZENSHIP APPEARING IN TRIAL.

But you may not be aware of the true facts of citizenship so as to raise the issue by plea or answer, and the true state of the citizenship may be developed by your evidence when the depositions on the merits are read, or from instruments filed in evidence. Remembering, as has been stated, that jurisdiction by diversity of citizenship is fundamental, that is, if the Federal jurisdiction is based upon it, and it does not exist, the court should not proceed further (act of 1875, sec. 5), you may therefore meet it by motion to dismiss at any stage of the proceeding, if it should appear. It is really the duty of the court *sua sponte* to dismiss the case without either motion or suggestion, if the want of jurisdiction clearly appears. However, you may take the initiative by filing a motion. *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 541, 542; *Williams v. Nottawa*, 104 U. S. 212, 26 L. ed. 719; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Graves v. Corbin*, 132 U. S. 590, 33 L. ed. 468, 10 Sup. Ct. Rep. 196; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Simon v. House*, 46 Fed. 319; *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606. This duty upon the part of the court to dismiss the case is made obligatory by the fifth section of the act of 1875. Prior to that time the jurisdiction of the court had to be raised by plea or answer when properly alleged in the bill, but this rule was changed by the act of 1875, sec. 5, which is as follows:

"That in any suit commenced in a circuit court or removed from a State court, it shall be made to appear to the satisfaction of said court, *at any time* after such suit has been brought or removed, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been

improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

It is seen that the circuit courts cannot escape the duty it imposes. The Supreme Court has frequently enforced this section on appeal, though no issue whatever was raised in the court below, or the Supreme Court. *Ibid.*; *Turner v. Farmers' Loan & T. Co.* 106 U. S. 555, 27 L. ed. 274, 1 Sup. Ct. Rep. 519; *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552.

It is said that if the evidence discloses the want of jurisdiction, or that the jurisdiction of the Federal court has been imposed upon, you should file a motion to dismiss. This may generally be discovered in advance of the trial in equity, from the fact that all the evidence is usually taken by depositions in advance of the trial, and the opportunity to examine them given. This examination should disclose the want of jurisdiction if it exists, and a motion be made to dismiss if so disclosed, which should be submitted at the earliest moment. If a motion becomes necessary you may prepare it as follows:

A. B.	}		In Circuit Court of the United States
vs.			for the.....District of
C. D.		In Equity	....., sitting at .....

And now comes C. D., the defendant, and moves the court to dismiss this suit and that he go hence with his costs in this behalf incurred, for that it appears by the evidence or instruments taken and filed in the cause that.....(naming him) is not a citizen of the State of ....., as alleged (or whatever may be the fact affecting the jurisdiction), and therefore no diversity of citizenship exists as alleged and upon which jurisdiction in this suit is based.

Wherefore defendant prays that because the suit does not really and substantially involve a controversy properly within the jurisdiction of the court, that the same be dismissed.

R. F.

Solicitor, etc.

*Wetmore v. Rymer*, 169 U. S. 120, 121, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

Of course, on the common-law side of the court, where the evidence may be entirely oral, you will have to await its devel-



opment at the trial before a motion can be filed or a suggestion made.

Here I must caution you that if there be suspicion that the jurisdiction is imposed upon, that you should raise the issue by plea or answer, because if no issue is raised, and you trust to its development in the evidence, you place yourself at a disadvantage as to the proof, as the court will not infer a want of jurisdiction unless it affirmatively appears *in the legitimate evidence taken on the substantial issues in the case*.

To illustrate: If you have no plea or answer raising the issue, the mere fact that you have asked questions as to citizenship in some of your depositions, the responses to such questions, not being on any issue in the case, would not be considered, as it would not be legitimate evidence taken on a substantial issue; but if you plead it, all the evidence remotely tending to prove the issue made will be considered.

### *How Tried.*

When the issue is raised, the judge may try the issue or submit it to a jury. *Wetmore v. Rymer*, 169 U. S. 120-122, 42 L. ed. 684, 685, 18 Sup. Ct. Rep. 293. See *Canadian P. R. Co. v. Wenham*, 146 Fed. 206, 207.

S. Eq.—9.

## CHAPTER XXIII.

### ISSUE AS TO DISTRICT OF SUIT OR VENUE.

What has been said as to the issue of jurisdiction, and the forms given by which it is presented, has had reference to fundamental conditions which could not be waived. I will now discuss the district of suit; how the issue is raised; and the forms applicable.

The requirement that a civil suit cannot be brought in any other district than that whereof the defendant is an inhabitant, except when the suit is based on a diversity of citizenship, then it may be brought in the district of the residence of either the plaintiff, or defendant, is only a personal exemption which must be pleaded in order to be available. *Platt v. Massachusetts Real Estate Co.* 103 Fed. 705; *Central Trust Co. v. McGeorge*, 151 U. S. 129, 132, 38 L. ed. 98, 99, 14 Sup. Ct. Rep. 286 (see "Territorial Jurisdiction," p. 2); *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 602, and authorities cited; *McPhee & McG. Co. v. Union P. R. Co.* 87 C. C. A. 619, 158 Fed. 8. If the suit is not brought in the district of which defendant is an inhabitant, or in case of diversity of citizenship in the residence district of the plaintiff or defendant, the issue should be raised at once by demurrer, plea, or answer. If apparent on the record, demurrer is the proper pleading to raise the issue; you may use the form for demurrer heretofore given. If not apparent, then it must be raised by plea, or answer. If by plea you may use the following form:

In Circuit Court of the United States  
for the.....District of  
....., sitting at.....

(Title as in bill.)

And now comes the defendant (naming him) and specially appearing under protest for the purpose of this plea, and for no other purpose, says that at the commencement of this suit he was not, and is not now, an inhabitant of, nor does he reside in the.....district of....., where this suit is brought (or if objection be to the division of the district use the words division of the.....district of....., in which this suit is brought), but says that at the commencement of this suit, and now, he was and is an inhabitant of and resided and now resides in.....

county, which is in the.....district of the State of....., and not in the.....district of....., where this suit is brought (or that at the commencement of this suit he was and is now an inhabitant of and resident citizen of the county of.....in the.....division of the .....district of....., that all process issuing to said.....county, of which he is an inhabitant and resident citizen, out of the Circuit Court of the United States, is returnable to the.....division of said.....district of.....and not to the.....division of said district where this suit is brought).

Wherefore defendant pleads his privilege to be sued in the.....district of....., of which he is a resident citizen and inhabitant (or to be sued in the.....division of the.....district of.....to which .....county, of which he is a resident citizen and inhabitant, is attached), and insists upon his exemption from suit in this court because he says the Circuit Court of the United States for the.....district of ..... (or the.....division of the Circuit Court of the United States for the.....district of.....) has jurisdiction in the premises and not this court.

Prayer to be dismissed.

R. F.,  
Solicitor, etc.

Certificate of counsel and affidavit of defendant to be attached.

If the defendant is a corporation and sued in the State of its organization, and not in the district of its residence, then plea may be in this form:

Title and commencement as before.

And now comes the C. D. Company, the defendant in the above cause, and specially appearing under protest for the purpose of this plea, and for no other purpose, says that at the commencement of this suit and now it was and is an inhabitant of, and resided in.....county in the.....district of....., where its principal office, or headquarters, is situated, its corporate meetings held and its corporate business transacted, and is not an inhabitant, etc. (See form above given.)

Wherefore insisting on its exemption it says not this court, but the Circuit Court of the United States for the.....district of....., has jurisdiction in the premises.

Prayer to be dismissed, signed, certified and sworn as before.

It has been the practice in some of the Federal districts, that where the defendant was an inhabitant of the district in which suit was brought, though not a resident citizen of the division of the district in which suit was brought, that the suit on motion would be transferred to the division of the district of which defendant was a resident citizen, and this was done on motion of the plaintiff in answer to a plea of privilege.

Under the acts of 1879 and 1902, rearranging certain districts, it is doubtful whether the court should permit this practice. As a matter of law the defendant is entitled to be sued in the division of the district of which he is an inhabitant, and when sued out of his division is entitled under his plea of privilege to have the suit dismissed.

By the acts above referred to, Congress created these subdivisions and designated the counties attached to each division to which process from that division could issue, and to which the process was returnable. Section 5 of the act of 1902 provides that if there be more than one defendant residing in different subdivisions, you may sue in either; but if a single defendant, you must return the process to the subdivision to which the county of his residence is attached. By act of May 4, 1898, Congress provided that in case of removals from State to Federal courts, the case must be removed to the subdivision to which the county of defendant's residence is attached. See sec. 53, New Code, chap. 4, embodying the act of May 4th, 1898.

The foregoing statutes clearly confined the suit in personal actions to the subdivision having the county of defendant's residence in its jurisdiction, and distinctly indicates the court in which suit must be brought. It gives to each subdivision a distinct jurisdiction confining its process to the counties attached to it, unless there be two or more defendants living in different subdivisions. Such being the case, the defendant served with process out of his subdivision, under circumstances not authorized by the statute, has as much right to have the suit dismissed as if served out of his district.

After Jan. 1st, 1912, the jurisdiction in such cases will be controlled by sec. 53, of the New Code; and by sec. 58, transfers of cases from one division to another by consent, or order of the court will be regulated.

Of course the *defendant* may waive by appearance or answer this privilege, or he may by motion remove the suit to his subdivision, but his right to a dismissal may be of vital interest, and it is a legal right under the act of 1879 and subsequent acts, which he may enforce if he does not wish to waive it. Acts 1879, 1898, 1902; The L. B. X. 88 Fed. 292; International Bank & T. Co. v. Scott, 86 C. C. A. 248, 159 Fed. 58. However, this refers only to personal actions. The L. B. X. 88 Fed. 295 (see "Territorial Jurisdiction,"——).

## CHAPTER XXIV.

### FEDERAL QUESTION.

We have been discussing the jurisdiction of the Federal courts as based upon the situation and citizenship of the parties, and I will now take up jurisdiction as based on the character of the subject-matter of the suit. The statute of 1888 provides that the circuit courts of the United States shall have jurisdiction of all cases at law or in equity arising *under the Constitution and laws of the United States*, or treaties made or to be made, if the amount or value in dispute exceeds two thousand dollars exclusive of interest and costs. While the Constitution of the United States left to Congress the power to declare the extent and distribute the jurisdiction among the Federal courts in this class of cases, *Nashville v. Cooper*, 6 Wall. 252, 18 L. ed. 852, yet from 1789 to 1875 the power was never exercised by Congress, except as to jurisdiction resting upon diversity of citizenship, and suits between aliens and citizens. The courts were organized for the benefits of non-residents and aliens, that they may escape the local influences of a State court. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 174.

The changed conditions created by the war between the States, and the strong tendency during that period to centralize power in the Federal government, inspired the judiciary act of 1875, in which the limit of constitutional power was reached by Congress in granting jurisdiction to the Federal courts.

It was deemed necessary that the supremacy of the laws and Constitution of the United States (U. S. Const. art. 6, cl. 2) must hereafter be enforced by the subordinate courts of its creation. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 171; *Osborn v. Bank of United States*, 9 Wheat. 818, 6 L. ed. 223; *Cohen v. Virginia*, 6 Wheat. 264, 5 L. ed. 257. It sought a speedier way of construing and enforcing rights arising

ing under the Constitution and laws of the United States than the old method through the State courts, and then by writ of error from the Supreme Court of the United States to the State court finally passing upon the Federal question; and then only when the State court had decided against the right claimed under laws or Constitution of the United States. U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 175.

Even the examination by the Supreme Court of the United States related only to the Federal question, and not to the issues of a non-Federal character. Ibid.; Murdock v. Memphis, 20 Wall. 590-626, 22 L. ed. 429-441; Dower v. Richards, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141. For if the judgment of the State court rested on grounds independent of the Federal question sufficient to sustain it, the writ of error would be refused. Haley v. Breeze, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; California Powder Works v. Davis, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 330, 41 L. ed. 178, 16 Sup. Ct. Rep. 1039; Eustis v. Bolles, 150 U. S. 361-366, 37 L. ed. 1111, 1112, 14 Sup. Ct. 131.

On March 3, 1875, Congress passed a jurisdictional and removal act, providing that all suits of a civil nature at common law or in equity, where the matter in dispute exclusive of costs exceeded the sum of five hundred dollars, and arising under the Constitution and laws of the United States, or treaties made or to be made, shall be heard in the circuit courts of the United States. Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 142, 37 L. ed. 1031, 14 Sup. Ct. Rep. 35. And thus for the first time this jurisdiction was conferred on the subordinate courts, and when the jurisdiction attached by reason of the Federal question, it extended to the whole case, with all the issues, Federal or non-Federal. Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 177, and authorities. Louisville Trust Co. v. Stone, 46 C. C. A. 299, 107 Fed. 309; Tennessee v. Union & Planters' Bank, 152 U. S. 454-456, 38 L. ed. 511, 512, 14 Sup. Ct. Rep. 654. With this brief view of the his-

tory of this jurisdiction the first question that presents itself is—

*What is a Federal Question?*

A case presents a Federal question when it becomes necessary to construe the Constitution, laws, or treaties of the United States in order to reach a correct decision of the material issues, or to decide as to the existence of some right, title, privilege, claim, or immunity asserted under the Federal Constitution and laws, or when plaintiff relies upon them, in whole or in part, for a recovery. *Dewey Min. Co. v. Miller*, 96 Fed. 2; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355, 356; *Starin v. New York*, 115 U. S. 257, 29 L. ed. 390, 6 Sup. Ct. Rep. 28; *Ames v. Kansas*, 111 U. S. 462, 28 L. ed. 487, 4 Sup. Ct. Rep. 437; *Lowry v. Chicago, B. & Q. R. Co.* 46 Fed. 83; *Minnesota v. Duluth & I. R. Co.* 87 Fed. 497; *Cooke v. Avery*, 147 U. S. 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 181; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *United States v. Old Settlers*, 148 U. S. 468, 37 L. ed. 524, 13 Sup. Ct. Rep. 650; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653. The Constitution, laws, or treaties must be directly involved. *Ibid.*; *Carson v. Dunham*, 121 U. S. 421, 426, 30 L. ed. 992, 993, 7 Sup. Ct. Rep. 1030; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274-278.

It may be stated in another form, thus: The suit must be such that some right, privilege, immunity, or title on which recovery depends will be defeated by one construction of the Constitution or laws, or sustained by a contrary construction. *Cooke v. Avery*, 147 U. S. 384, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Little York Gold-Washing & Water Co. v. Keyes*, *supra*; *New Orleans v. Benjamin*, 153 U. S. 411-424, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Farson v. Chicago*, 138 Fed. 186; *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38

L. ed. 513, 14 Sup. Ct. Rep. 654; *Starin v. New York*, supra; *Gibbs v. Crandall*, 120 U. S. 106, 30 L. ed. 590, 7 Sup. Ct. Rep. 497; *Shreveport v. Cole*, 129 U. S. 41, 32 L. ed. 591, 9 Sup. Ct. Rep. 210. It must really and substantially involve a controversy, the determination of which depends on the construction of the Federal law. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 174; *California Oil & Gas Co. & v. Miller*, 96 Fed. 12; *New Orleans v. Benjamin*, 153 U. S. 424, 38 L. ed. 769, 14 Sup. Ct. Rep. 905; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 196; *Bridge Proprs. v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Hamblin v. Western Land Co.* supra; *Carson v. Dunham*, 121 U. S. 426, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030. It must be a question of *law* as stated by the plaintiff in his complaint. *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 193; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626; *California Oil & Gas Co. v. Miller*, supra; not an issue of fact. *Ibid.* *Fitzgerald v. Missouri P. Co.* 45 Fed. 812.

And it may not only be a demand for something conferred by the Federal law (*Ibid.*; *Cohen v. Virginia and Tennessee v. Davis*, supra), but it may be a right, claim, defense, or protection, in whole or in part, growing out of the Federal legislation or constitutional provisions. *Sowles v. Witters*, 43 Fed. 700; *Nashville, C. & St. L. R. Co. v. Taylor*, 96 Fed. 178; *Minnesota v. Duluth & I. R. Co.* supra; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 357; *Cooke v. Avery and Starin v. New York*, supra; *Bock v. Perkins*, 139 U. S. 630, 35 L. ed. 315, 11 Sup. Ct. Rep. 677; *Frank v. Leopold & F. Co.* 169 Fed. 923; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96. Thus it is seen that the Federal question arises not only when the claim is based on Federal law, but also when it appears that the right of recovery may be defeated by a construction which may fairly be contended for. *Ibid.*

Judge Shiras, in his *Equity Practice*, page 17, says the jurisdiction in the phrase, "Cases arising under the Constitution, laws and treaties made," etc., is divided into two classes.

First. Where the cause of action springs directly from some provision of the Federal laws, as when the right claimed is directly given by Federal law, or where the cause of action arises out of some act of a Federal officer, based on Federal



law, as in cases of United States marshals. This is designated as jurisdiction direct and primary.

Second. When causes of action are based on or supported by the laws of a State thought to be in conflict with some right, duty, power, or franchise created or conferred by the Constitution of the United States, or its laws and treaties. This may be designated as derivative, or secondary, jurisdiction.

### *Direct and Primary.*

Under this first head, suits by and against officers of the Federal government must fall under the control of the Federal courts when the acts complained of were done in their official capacity, and must necessarily be suits arising under the laws of the United States. *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Feibelman v. Packard*, 109 U. S. 424, 27 L. ed. 985, 3 Sup. Ct. Rep. 289; *Backrack v. Norton*, 132 U. S. 338, 33 L. ed. 377, 10 Sup. Ct. Rep. 106; *Sonnenheil v. Christian Moerlin Brewing Co.* 172 U. S. 404, 43 L. ed. 494, 19 Sup. Ct. Rep. 233; *Bock v. Perkins*, *supra*; *Wood v. Drake*, 70 Fed. 881. Thus in 70 Fed. 881, *supra*, it was held that an action for damages for false imprisonment against a United States marshal acting under process from the Federal courts was within the Federal jurisdiction and could be removed, although the complaint is drawn to conceal the official character of the officer. This case, however, was subsequently modified, as will be seen hereafter.

An action against Federal officers as such, growing out of acts in executing Federal process, is within the jurisdiction of the Federal courts, regardless of citizenship or the absence of any disputed question of Federal law. *Ibid.*; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Bock v. Perkins and Wood v. Drake*, *supra*; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; *Guarantee Co. v. Hanway*, 44 C. C. A. 312, 104 Fed. 371; *Grant v. Spokane Nat. Bank*, 47 Fed. 673; *Jewett v. Whitcomb*, 69 Fed. 417; *Hurst v. Cobb*, 61 Fed. 2.

The rule has thus been laid down, and belongs to a line of Federal cases that hold all actions which bring into question the acts of officials or corporations created by, or representing,

the national government, are cases arising under the Constitution and laws of the United States. *Texas & P. R. Co. v. Cox*, 145 U. S. 602, 36 L. ed. 832, 12 Sup. Ct. Rep. 905; *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 80; *Bailey v. Mosher*, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 491; *National Bank v. Wade*, 84 Fed. 12. As said, the national government must be permitted to exercise its powers in the States through its own appointed agencies, and national courts must be the arbiters as to the lawfulness of the acts of its agents.

In *McKee v. Brooks*, 64 Tex. 255, the supreme court of the State says that to determine the liability of a United States marshal sued upon his bond for a trespass committed while acting in his official capacity, resort must be had to section 783 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 607; and as to the extent of the damage to be allowed, section 784 of the United States Revised Statutes is applicable, and that a suit which cannot be prosecuted and determined without resort to the acts of Congress becomes a suit arising under the laws of the United States, and therefore within Federal jurisdiction, following *Feibelman v. Packard*, supra, before cited, *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Files v. Davis*, 118 Fed. 465, 466.

There is no question that the rule as above given is the true rule when the Federal officer is sued as such, or when suit is upon his bond given by Federal law for a proper performance of duty, but the question arises, Suppose the Federal officer is not sued as such, nor is he sued upon his bond, but as a simple trespasser in seizing property under Federal process, then what is the rule?

In *McKee v. Coffin*, 66 Tex. 307, 1 S. W. 276, a United States marshal was sued to recover the value of certain property alleged to have been illegally seized and converted by him. The United States marshal justified the seizure under Federal process, and sought to remove the case into the Federal court. The suit was not upon the bond of the marshal, nor was he sued as United States marshal. The court denied the right of removal on the ground that he was United States marshal only shown by his own pleading. The same condition of case arose in *Mayo v. Dockery*, 108

Fed. 898, and the issue of jurisdiction arose on the motion to remand to the State court, and the case was remanded back to the State court. The court laid down as the basis of its action, that since the jurisdictional act of 1888 the petition of plaintiff must set forth the fact that the defendant is sued as United States marshal; that the rule prior to the act of 1888 as illustrated in *Bock v. Perkins*, supra, has been changed; and that now the Federal question must appear in the petition (*Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654), or the Federal court cannot take jurisdiction, and that the defense that an act was performed in an official capacity could not give the Federal court jurisdiction (*Walker v. Collins*, 167 U. S. 58, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Postal Teleg. Cable Co. v. United States* [*Postal Teleg. Cable Co. v. Alabama*] 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192).

The rule then may be stated, that if the petition shows the defendant is sued as United States marshal, or that the act complained of was done in his official capacity, the case would present a Federal question and within the jurisdiction of the Federal courts, without reference to citizenship of parties (*Sonnenthiel v. Christian Moerlin Brewing Co.* 172 U. S. 401-405, 43 L. ed. 492-494, 19 Sup. Ct. Rep. 233; *Mayo v. Dockery*, 108 Fed. 899; *Frank v. Leopold & F. Co.* 169 Fed. 922), but if the defendant is sued as an individual, without reference in the petition to his official position, then the case cannot be removed to the Federal courts. *People's United States Bank v. Goodwin*, 160 Fed. 728; *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; *Walker v. Collins* and *Chappell v. Waterworth*, supra; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 494, 495, 40 L. ed. 1049, 1050, 16 Sup. Ct. Rep. 869; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Filhiol v. Torney*, 194 U. S. 356, 48 L. ed. 1014, 24 Sup. Ct. Rep. 698; *Joy v. St. Louis*, 201 U. S. 332, 50 L. ed. 776, 26 Sup. Ct. Rep. 478; *Filhiol v. Maurice*, 185 U. S. 108, 46 L. ed. 827, 22 Sup. Ct. Rep. 560.

These cases clearly modify the broad statements in *Wood v. Drake*, supra, and is due to the difference between the juris-

dictional acts of 1875 and 1888 as shown in *Tennessee v. Union & Planters' Bank*, supra; *People's United States Bank v. Goodwin*, 160 Fed. 729. While the undoubted rule as stated in the foregoing cases requires the Federal question to appear in the plaintiff's statement of his own claim, and if it does not so appear the want cannot be supplied in the subsequent pleadings or petition for removal, yet we have a line of cases that seek to evade this rule of Federal jurisdiction, where the ingenuity of counsel has suppressed the facts that would have given jurisdiction. *Wood v. Drake*, 70 Fed. 882. But as said in *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 873, the plaintiff has a right to set up his case as he pleases, and is not required to state matters not essential to his cause of action, and which would more properly come from the other side. As long as he sets up his claim in legal and logical form, and specifically states his cause of action resting upon the common law of the land, the courts have no right to go behind it to uncover motive. *People's United States Bank v. Goodwin*, 160 Fed. 730; *Washington v. Island Lime Co.* 117 Fed. 778; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 248, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 495, 496, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206-216, 50 L. ed. 441-446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147.

By section 643 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 521, it is provided that any civil or criminal suit commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, shall be removed to the Federal court. This act is held to cover United States marshals, deputies, and assistants engaged in the service of process for arrest, or otherwise within the purview of the law. *Davis v. South Carolina*, 107 U. S. 600, 27 L. ed. 575, 2 Sup. Ct. Rep. 636; *Tennessee v. Union & Planters' Bank*, 152 U. S. 463, 38 L. ed. 514, 14 Sup. Ct. Rep. 654.

## CHAPTER XXV.

### CORPORATIONS CHARTERED BY CONGRESS.

Under this head may be classed corporations chartered by Congress, as it is held that a suit against a Federal corporation necessarily involves some exercise of corporate power received under a Federal law, and therefore the suit arises under the laws of the United States. See *Pacific Railroad Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Texas & P. R. v. Cox*, 145 U. S. 601, 36 L. ed. 832, 12 Sup. Ct. Rep. 905; *Texas & P. R. Co. v. Cody*, 166 U. S. 609, 41 L. ed. 1134, 17 Sup. Ct. Rep. 703; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 918, 78 Fed. 387; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 618, 41 L. ed. 1136, 1138, 17 Sup. Ct. Rep. 707; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 494, 40 L. ed. 1049, 16 Sup. Ct. Rep. 869. In a word, if the bill shows that the defendant is a corporation acting under a Federal charter, it may be removed from the State to the Federal court, or if the congressional corporation be complainant, and it is alleged as such in the bill, a Federal court will take jurisdiction, as such allegation presents a Federal question. *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 494, 495, 40 L. ed. 1049, 1050, 16 Sup. Ct. Rep. 869; *Texas & P. R. Co. v. Beckwith* (Tex. Civ. App.) 118 S. W. 729; *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385; *Texas & P. R. Co. v. Watson* (Tex. Civ. App.) 43 S. W. 1060; *Spekart v. German Nat. Bank*, 85 Fed. 12. (See "Removals on ground of Federal question.")

This seems to be an exception to the rule that the bill of complaint must show that the Federal question must affect a material issue in the case, and I mention it here because of the immunity given by the exception to a great corporation operat-

ing within a State from being sued in the State courts, if the claim exceeds two thousand dollars exclusive of interest and costs, and said corporation elects not to be sued in the State courts. The right rests upon its Federal charter, and not upon any issue in the cause depending upon the construction of the Federal Constitution or laws.

The Supreme Court, in *Texas & P. R. Co. v. Cody*, 166 U. S. 606-616, 41 L. ed. 1132-1136, 17 Sup. Ct. Rep. 703; *Pacific R. Removal Cases*, *supra*, held that the Texas & Pacific Railway Company, operating under a Federal charter, may remove all suits begun in the State courts, involving, of course, the jurisdictional amounts, to the Federal courts for trial. Chief Justice Fuller bases this great privilege upon the fact that the breath of life having been breathed into the corporation by Federal lungs, that it moves, acts, and has its being in that source, and necessarily all of its faculties and capacities are derived from the national fiat; consequently all of its acts, good, bad and indifferent, though wholly within the State of Texas, could only have been inspired by its national life. So, then, suits of any nature against or by this corporation arise under the laws of the United States, whether it be for damages for personal injuries, or the failure to transport a car of cattle shipped from one point in the State to another. The Chief Justice says that it does not even require an allegation of its Federal charter nor a hint of its national life, nor is it necessary to show upon what Federal law its liability for injuries to men, or cattle, or nondelivery of freight rests. Its common-law and statutory liability for carriage with the State is overshadowed by its congressional charter.

In the *Cody Case*, 166 U. S. 608, 41 L. ed. 1133, 17 Sup. Ct. Rep. 703, suit was brought by Cody for damages for personal injury. The petition set forth that the Texas & Pacific Railway was a corporation created by the laws of Texas and operating a line of railway in that State, and upon the line in that State the injury happened. The suit was brought in the State court of Tarrant county, and was removed to the Federal court upon a petition setting up the Federal charter of the defendant, and consequently the suit arose under the laws of the United States. There is in the petition no suspicion of a Federal question, and the petition for removal raises none other

than the organization of the corporation by Congress. You will further notice that a Federal question was not raised by plaintiff, but by the defendant corporation, which was apprehensive that the decisions in *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654, and cases preceding and following it, had overruled 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113, known as the "Removal Cases." You will see from the conclusions of the Supreme Court in *Metcalf v. Watertown*, 128 U. S. 588, 32 L. ed. 544, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Tennessee v. Union & Planters' Bank*, *supra*; *Chappell v. Waterworth*, 155 U. S. 107, 39 L. ed. 87, 15 Sup. Ct. Rep. 34; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Postal Teleg. Cable Co. v. United States* (*Postal Teleg. Cable Co. v. Alabama*) 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; since followed in *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. Rep. 603; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738, that there was grave cause for apprehension that 115 U. S. 1, and kindred cases, had been overruled. In all of these cases it was decided that if the Federal question did not appear in plaintiff's petition, the Federal court had no jurisdiction. The court in the *Cody Case* substantially concedes that these cases establish this rule, but says they do not apply to the *Texas & Pacific Railway*, and that, even if the petition had described the defendant as the *Texas & Pacific Railway Company* by name, and no more, there would have been no question that the court's *judicial knowledge* of the Federal character of the corporation would have been sufficient to supply all that was necessary to give the Federal court jurisdiction. It seems that whenever the *Texas Pacific Railway* has sought to remove a case on the ground of its Federal charter, and without reference to the nature of the cause of action, the courts have adhered to the decision in the *Cody Case*. *Re Dunn*, 212 U. S. 386, 53 L. ed. 563, 29 Sup. Ct. Rep. 299; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 77; see

Scott v. Choctaw, O. & G. R. Co. 112 Fed. 180; Greer v. Texas & P. R. Co. 17 Tex. Civ. App. 359, 42 S. W. 1038.

We have then, as a result of these decisions, that a removal cannot be had from a State to a Federal court, nor can a suit be brought originally in the circuit court of the United States, based on a Federal question or removed by a Federal corporation, unless the Federal question appears in the statement of plaintiff's case as made by himself, except in suits brought against or by the Texas & Pacific Railway Company. The Cody suit clearly justifies this statement, and I think it will be emphasized by reading carefully Oregon Short Line & U. N. R. Co. v. Skottowe, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869, which the Chief Justice declares to be in harmony with his views.

In 162 U. S. 490, the court was dealing with a corporation organized under similar conditions preceding the chartering of the Texas & Pacific Railway Company; that is, in the one case the corporation was created by Congress by consolidating corporations created under the laws of the States of Utah, Wyoming, and Nevada; in the other case the Southern Pacific & Transcontinental Railways of Texas were consolidated by Congress and incorporated as the Texas & Pacific Railway Company, *supra*; and yet in 162 U. S. 490, the court insists that the Federal character of the corporation must appear in the petition of plaintiff to give the Federal courts jurisdiction, and not in the subsequent pleadings of the defendant.

The removal cases in 115 U. S. upon which the conclusions reached in the Cody Case were based, rested solely on the old case of Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204. No distinction seems to have been drawn between the powers and operations of a fiscal agent of the government, chartered by Congress, and the powers and operations of a railroad company chartered by Congress, having law and statutory duties as a common carrier.

I have thus dwelt on this Cody Case to show an exception was made to the unbroken line of decisions since 1888, that a Federal question must appear in the plaintiff's petition to give the Federal courts jurisdiction, and not in the petition for removal or subsequent pleadings.

In Tennessee v. Union & Planters' Bank, 152 U. S. 463, 38



L. ed. 514, 14 Sup. Ct. Rep. 654, the court says that the rule as thus laid down, in *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173, applies more comprehensively to the act of 1888 than the act of 1875, because the corresponding clause in section 2 of the act of 1888 allows removals from a State court to be made only by nonresident defendants and in suits of which the circuit courts of the United States are given original jurisdiction by section 1, thus limiting removals by defendant from State courts to such suits as might have been brought in the circuit court by plaintiff under the first section.

To further emphasize the fact that under the act of 1888 the Federal question could not be set up by subsequent pleadings if not apparent in the petition, section 6 of the act of 1888 specially repealed section 640 of the United States Revised Statutes, which authorized any suit commenced in a State court against a Federal corporation upon the petition of the defendant, that its defense arose under the laws and constitution of the United States, *Tennessee v. Union & Planters' Bank*, *supra*, can be removed to the Federal court.

Your attention is called to the fact that in *Re Dunn*, 212 U. S. 384, 53 L. ed. 562, 29 Sup. Ct. Rep. 299, some stress seems to be laid on a clause in the charter of the Texas & Pacific Railway Company, giving it a right to sue and be sued in the Federal courts. Under chap. 3, sec. 28, of the New Code, *no suit* brought in a State court under the employer's liability act of 1908 and amendments, can be removed to a Federal court.

### . *National Banks.*

In chapter 14, I discussed the citizenship of National banks as affecting jurisdiction, and we saw that these Federal corporations were placed on the same footing with the State Corporations, except in cases where Federal officers were winding up the affairs of the institution. Act 1888, sec. 4 (see Appendix); *Speckart v. German Nat. Bank*, 85 Fed. 12; same case, 38 C. C. A. 682, 98 Fed. 153; *Guarantee Co. of N. A. v. Hanway*, 44 C. C. A. 312, 104 Fed. 372; chap. 2, sec. 16, New Code. In cases, however, where a Federal question is involved,

they may enter the Federal courts without reference to citizenship, if the proper amount is involved. The Federal charter is not the basis of the right, but the Federal question must appear in the statement of the case (*Larabee v. Dolley*, 175 Fed. 367-382), and it does appear whenever the controversy touches their rights under the law of their creation. *Ibid.* 384; *Huff v. Union Nat. Bank*, 173 Fed. 336.

So in all proceedings by any national banking association to enjoin the Comptroller of the Currency under provisions of the national banking law, suit may be brought in the district in which such association is located. Chap. 4, sec. 49, New Code.

## CHAPTER XXVI.

### IMPAIRING OBLIGATION.

The most frequent and familiar illustrations of the Federal question arise under alleged conflicts of State legislation with section 10, article 1, and the provisions of the 14th Amendment to the Constitution of the United States. As where it is claimed that State legislation has impaired the obligation of a contract. *American Teleph. & Teleg. Co. v. Decatur*, 176 Fed. 133; *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375; *Illinois C. R. Co. v. Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Bacon v. Texas*, 163 U. S. 216, 41 L. ed. 136, 16 Sup. Ct. Rep. 1023; *Whitman College v. Berryman*, 156 Fed. 112-117; *Green v. Oemler*, 151 Fed. 936; *Larabee v. Dolley*, 175 Fed. 368; *Harrison v. Remington Paper Co.* 3 L.R.A. (N.S.) 954, 72 C. C. A. 405, 140 Fed. 391, 392, 5 A. & E. Ann. Cas. 314; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736; *Wilson v. Brochon*, 95 Fed. 82; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 563, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653; *McCullough v. Virginia*, 172 U. S. 116, 43 L. ed. 387, 19 Sup. Ct. Rep. 134; *Louisiana v. Pillsbury*, 105 U. S. 294, 26 L. ed. 1095; *Underground R. Co. v. New York*, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494; *National Mut. Bldg. & L. Asso. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532. And such effect may arise from a by-law or ordinance of a municipal corporation. *Missouri K. & I. R. Co. v. Olathe*, 156 Fed. 632, and authorities cited; *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311, 51 L. ed. 198, 27 Sup. Ct. Rep. 83; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575; *Mercantile Trust & D. Co. v. Collins Park & Belt R. Co.* 99 Fed. 812; *Davis & F. Mfg. Co. v. Los Angeles*, 189

U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498; Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; Bacon v. Texas, *supra*; Pacific Electric R. Co. v. Los Angeles, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; Walla Walla v. Walla Walla Water Co. 172 U. S. 2, 43 L. ed. 342, 19 Sup. Ct. Rep. 77; People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 L. ed. 851, 24 Sup. Ct. Rep. 520; Defiance Water Co. v. Defiance, 191 U. S. 191, 48 L. ed. 143, 24 Sup. Ct. Rep. 63; American Teleph. & Teleg. Co. v. Decatur, *supra*, and cases cited; Los Angeles City Water Co. v. Los Angeles, 103 Fed. 711; Southern Bell Teleph. & Teleg. Co. v. Richmond, 44 C. C. A. 147, 103 Fed. 31; Savannah v. Holst, 65 C. C. A. 449, 132 Fed. 901; Iron Mountain Co. v. Memphis, 37 C. C. A. 410, 96 Fed. 113.

### *Privileges and Immunities.*

Again, when one has been deprived by such legislation of certain privileges and immunities of citizenship. United States v. Moore, 129 Fed. 632; Cooke v. Avery, 147 U. S. 384, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; Knight v. Shelton, 134 Fed. 426; Starin v. New York, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; First State Bank v. Shallenberger, 172 Fed. 1000; Slaughter-House Cases, 16 Wall. 36, 116, 122, 21 L. ed. 394, 421, 423; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Swafford v. Templeton, 108 Fed. 310, S. C. 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; Skinner v. Garnett Gold Min. Co. 96 Fed. 735. It will be seen in these cases that the protection thus committed to the Federal government is the right or privilege granted in terms by some provision of the Constitution, or appropriate to the enjoyment of a right, etc., conferred on the citizen by the Constitution.

### *Due Process of Law.*

Or of some right or interest without due process of law. Central R. Co. v. Macon, 110 Fed. 865; San Joaquin & K.

River, Canal & Irrig. Co. v. Stanislaus County, 90 Fed. 516; Consolidated Water Co. v. San Diego, 35 C. C. A. 631, 93 Fed. 849; Ex parte Young, 209 U. S. 144, 52 L. ed. 722, 13 L.R.A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Hastings v. Ames, 15 C. C. A. 628, 32 U. S. App 485, 68 Fed. 728; Barney v. New York, 193 U. S. 430, 48 L. ed. 737, 24 Sup. Ct. Rep. 502; United States v. New York, N. H. & H. R. Co. 165 Fed. 742-746; Savannah v. Holst, *supra*; Ozark-Bell Teleph. Co. v. Springfield, 140 Fed. 666; Louisville v. Cumberland Teleph. & Teleg. Co. 84 C. C. A. 151, 155 Fed. 725, 12 A. & E. Ann. Cas. 500; Chicago R. Co. v. Chicago, 142 Fed. 845; Lochner v. New York, 198 U. S. 63, 49 L. ed. 944, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581; White v. Tacoma, 109 Fed. 32; Southern R. Co. v. North Carolina Corp. Commission, 97 Fed. 513.

*Equal Protection of the Laws.*

Or of some deprivation of the equal protection of the laws. *Ibid.*; Ex parte Young, *supra*; United States v. New York, N. H. & H. R. Co. 165 Fed. 746; Cincinnati Street R. Co. v. Snell, 193 U. S. 30, 37, 48 L. ed. 604, 607, 24 Sup. Ct. Rep. 319; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 393, 40 L. ed. 467, 469, 16 Sup. Ct. Rep. 344; St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 629; Anglo American Provision Co. v. Davis Provision Co. 105 Fed. 536; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 169; Cotting v. Kansas City Stock Yards Co. 183 U. S. 79, 102, 46 L. ed. 92, 106, 22 Sup. Ct. Rep. 30; Raymond v. Chicago Union Traction Co. 207 U. S. 36, 52 L. ed. 87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; Williamson v. Liverpool L. & G. Ins. Co. 72 C. C. A. 542, 141 Fed. 54, 5 A. & E. Ann. Cas. 402. Again we have innumerable cases in which the railroads of the land have sought Federal protection from alleged unreasonable rates, upon the ground that they were being deprived of their property without "due process of law," and thus deprived of "the equal protection of laws." Ex parte Young, *supra*; Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Poor v. Iowa C.

R. Co. 155 Fed. 226, 227; *Perkins v. Northern P. R. Co.* 155 Fed. 445, and cases cited therein, illustrate the application of these clauses of the Federal Constitution creating the "Federal question."

The provisions of the 14th Amendment in protecting rights of property and privileges and immunities of citizenship has been applied not only to annual adverse legislation, but to executive and judicial acts, as well, affecting individual rights as stated. *Raymond v. Chicago Union Traction Co.* 207 U. S. 20-36, 52 L. ed. 78-87, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; *Scott v. McNeal*, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; *United States v. Cruikshank*, 92 U. S. 542-545, 23 L. ed. 588-590; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 184, 185; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

We see, then, the 14th Amendment is directed against a State and its agencies, and not individuals. *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152; *Western U. Teleg. Co. v. Andrews*, 154 Fed. 95; *Morrill v. American Reserve Bond Co.* 151 Fed. 305; *St. Louis & S. F. R. Co. v. Hadley*, 161 Fed. 421; *Lindsley v. Natural Carbonic Gas Co.* 162 Fed. 954; *Western U. Teleg. Co. v. Julian*, 169 Fed. 166; *Marten v. Holbrook*, 157 Fed. 716; *Central R. Co. v. McLendon*, 157 Fed. 961; *Central R. Co. v. Railroad Commission*, 161 Fed. 925; *Southern R. Co. v. McNeill*, 155 Fed. 757.

So a Federal question may arise when right of recovery rests upon unconstitutionality of an act of Congress. *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Ct. Rep. 493.

I have thus set forth the prolific source of Federal jurisdiction. It would serve no useful purpose in this work to review the cases, but they have been selected to illustrate the various phases and conditions under which the Federal courts have given or refused relief under the provisions of the Constitution, as above stated.

It is apparent that "due process of law" and "the equal protection of the laws" is the familiar refuge of those whose rights are alleged to have been impaired by laws from whatever source they emanate (*Bacon v. Texas*, *supra*), and that the word "law" as used in this Amendment means both the general law

of the land, which protects life, liberty, property, and immunities, and the laws of procedure. *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *United States v. New York, N. H. & H. R. Co. supra*.

## CHAPTER XXVII.

### WHERE THE FEDERAL QUESTION MUST APPEAR.

Whether a case presents a Federal question or not must be determined from the face of the bill. That is, it must appear in plaintiff's statement of his own claim, not by mere averment. *New Orleans v. New Orleans Water Works Co.* 142 U. S. 79-87, 35 L. ed. 943-946, 12 Sup. Ct. Rep. 142; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 662, 42 L. ed. 316, 17 Sup. Ct. Rep. 925; nor from inference or argument. *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051. But it must appear in the plain logical statement of plaintiff's case. *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 244, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867; *Louisville v. Cumberland Teleph. & Teleg. Co.* 155 Fed. 725-730, 12 A. & E. Ann. Cas. 550. *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66-78, 44 L. ed. 673-680, 20 Sup. Ct. Rep. 545; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 495, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 872; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 341; *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 877; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274; *S. C.* 188 U. S. 644, 47 L. ed. 633, 23 Sup. St. Rep. 434; *Filhiol v. Torney*, 119 Fed. 976; *Joy v. St.*



Louis, 122 Fed. 524; *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 632.

These conditions were true under the act of 1875 in suits originally brought in the circuit court (*Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173); but under this act, in removals from State to Federal courts, the Federal question could be presented in the plea, answer, or petition for removal. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654, and authorities cited; *Mayo v. Dockery*, 108 Fed. 898. But this is not true under the act of 1888. *Ibid.* The authorities above cited show that the Federal question must appear in the bill, and not in any subsequent pleading. *Wise v. Nixon*, 78 Fed. 204; *Tennessee v. Union & Planters' Bank* and *Chappell v. Waterworth*, *supra*; *Postal Teleg. Cable Co. v. United States* (*Postal Teleg. Cable Co. v. Alabama*) 155 U. S. 482, 39 L. ed. 231, 13 Sup. Ct. Rep. 192; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

*Remedies if Federal Question Not Raised in Bill.*

This fact, however, that the Federal question cannot be raised by the answer or subsequent pleading to give Federal jurisdiction, does not deprive the defendant of the right of having the question finally passed upon by the Supreme Court of the United States. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396. If you set up the Federal question in the answer in the State court, you place yourself in a position to appeal from the highest State tribunal having jurisdiction to finally pass upon the issue, which in some State may be the supreme court or one of the lower courts, to the Supreme Court of the United States, provided the decision of the State court of last resort has been against the right claimed under the Federal Constitution or laws. U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Giles v. Teasley*, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359; *Chicago, B. & Q. R. Co.*

v. Chicago, 166 U. S. 232, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Meyer v. Richmond, 172 U. S. 92, 43 L. ed. 377, 19 Sup. Ct. Rep. 106; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 68, 43 L. ed. 368, 19 Sup. Ct. Rep. 97; Harrison v. Morton, 171 U. S. 47, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; Eustis v. Bolles, 150 U. S. 366, 37 L. ed. 1112, 14 Sup. Ct. Rep. 131.

In the event the Federal issue is declared against you by the judgment of the State court, and the judgment of the State court does not rest on any other ground than is involved in the Federal question, then you may sue out a writ of error from the Supreme Court of the United States to the State court of final resort deciding *against* the Federal question, and have the question determined by the Supreme Court of the United States. McNulta v. Lockridge, 141 U. S. 331, 35 L. ed. 799, 12 Sup. Ct. Rep. 11; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Dewey v. Des Moines, 173 U. S. 199, 43 L. ed. 666, 19 Sup. Ct. Rep. 379. But if the judgment of the State court rests wholly on grounds of a non-Federal character, the writ of error will not be granted, though there be a Federal question in issue. Leathe v. Thomas, 207 U. S. 93, 98, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Delaware City S. & P. S. B. Nav. Co. v. Reybold, 142 U. S. 637, 35 L. ed. 1142, 12 Sup. Ct. Rep. 290; Haley v. Breeze, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836; Giles v. Teasley, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359; Sauer v. New York, 206 U. S. 536-546, 51 L. ed. 1176-1181, 27 Sup. Ct. Rep. 686; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Seeberger v. McCormick, 175 U. S. 280, 44 L. ed. 163, 20 Sup. Ct. Rep. 128; Bacon v. Texas, 163 U. S. 227, 41 L. ed. 139, 16 Sup. Ct. Rep. 1023; Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; Nashville, C. & St. L. R. Co. v. Taylor, *supra*.

### *Section 709, United States Revised Statutes.*

This power of revision of the decision of the State courts by the Supreme Federal Court is given by the United States

Revised Statutes, § 709, U. S. Comp. Stat. 1901, p. 575, which provides for the writ of error to the State court of last resort:—

First. When the State court decides against the 'right claimed under the Federal law, or the validity of a treaty, or an authority exercised under the United States, when drawn in question in the cause so decided.

Second. When there is drawn in question the validity of a statute, or an authority exercised under a State, on the ground of repugnancy to the Constitution, treaty, or laws of the United States, and the decision of the State court is in favor of their validity.

Third. When any right, title, privilege, or immunity is claimed under the Constitution, laws, or treaties of the United States, or *commission* held, or authority exercised under the United States, and the decision of the State court is against the right, title, privilege, or immunity set up or claimed by either party, under the Constitution, laws, treaties, commission, or authority. U. S. Rev. Stat. § 709, is embodied in sec. 237 of the New Judicial Code.

This statute is much more comprehensive than the sections of the judiciary act of 1875 and 1888, giving to the circuit courts of the United States jurisdiction when the Constitution, laws, and treaties of the United States are to be construed in determining the material issues in a case, in that it gives a further right to Federal supervision, as when the cause of action arises under a *commission* held or authority exercised under the United States (*Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Carson v. Dunham*, 121 U. S. 428, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 307, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *McGuire v. Massachusetts*, 3 Wall. 385, 18 L. ed. 165; *Cooke v. Avery*, 147 U. S. 385, 37 L. ed. 212, 13 Sup. Ct. Rep. 340; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 14, 15, 45 L. ed. 404, 21 Sup. Ct. Rep. 240; *Avery v. Popper*, 179 U. S. 309, 45 L. ed. 204, 21 Sup. Ct. Rep. 94), and creates a different mode in which a Federal question may arise (*Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175, 176; *McNulta v. Lockridge*, 141 U. S. 330, 331, 35 L. ed. 798, 799, 12 Sup. Ct. Rep. 11); as, where a suit is brought

in a State court on a Federal judgment obtained in another State, while such suit could not be removed to the United States circuit court, yet a writ of error would lie to the Supreme Court of the United States, if the State court of last resort should fail to give full effect to the authority exercised under the United States as shown by the judgment, because it comes within the letter of section 709. *Provident Sav. Life Assur. Soc. v. Ford*, 114 U. S. 641, 29 L. ed. 263, 5 Sup. Ct. Rep. 1104; *Carson v. Dunham*, 121 U. S. 428, 429, 30 L. ed. 994, 995, 7 Sup. St. Rep. 1030; *Avery v. Popper*, 179 U. S. 314, 45 L. ed. 206, 21 Sup. Ct. Rep. 94; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 175.

So where a suit enforcing a property right acquired under a judgment of a Federal court, if the highest court of a State should fail to give effect to the authority exercised under the United States, as shown by the judgment and decrees of their courts, then its decision may be subjected to revision under section 709. *Ibid.*; *Huntington v. Attrill*, 146 U. S. 666, 36 L. ed. 1127, 13 Sup. Ct. Rep. 224; *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

Thus we see there are issues presenting a Federal question, but only to be revised by the Supreme Court of the United States and not within the acts of 1875 and 1888, giving jurisdiction to the circuit courts of issues resting upon the existence of a Federal question.

To take advantage of this statute, you will see by the third clause that it must be specially set up and claimed by either party, that is, the right, title, or immunity claimed must be pleaded. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 476, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Dewey v. Des Moines*, 173 U. S. 198, 43 L. ed. 666, 19 Sup. Ct. Rep. 379; *Eustis v. Bolles*, *supra*; See *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47. See *Meyer v. Richmond*, 172 U. S. 83, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Green Bay & M. Canal Co. v. Patten Paper Co.* *supra*; But where the validity of a statute or treaty of the United States is raised in any suit brought in a

State court, and the decision is against it, or where the validity of a State statute is drawn in question as being repugnant to the Constitution or laws of the United States, and the validity of the State statute is sustained, then if the Federal question appears in the record and was necessarily involved and decided, or if the case could not be decided without deciding the Federal question, then the fact that it was not specially set up does not prevent a review of the question in the Supreme Court of the United States. *Ibid.*; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 127, 48 L. ed. 376, 24 Sup. Ct. Rep. 221; *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; *Chapman v. Goodnow* (*Chapman v. Crane*) 123 U. S. 548, 31 L. ed. 238, 8 Sup. Ct. Rep. 211; *Green Bay & M. Canal v. Patten Paper Co.* 172 U. S. 58-68, 43 L. ed. 364-368, 19 Sup. Ct. Rep. 97; *Harrison v. Morton*, *supra*; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 579, 28 L. ed. 1086, 5 Sup. Ct. Rep. 681; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 622, 42 L. ed. 881, 18 Sup. Ct. Rep. 488; *Millingar v. Hartupee*, 6 Wall. 262, 18 L. ed. 830.

No particular form of words is necessary to raise the Federal question, within the meaning of the clause of the section under consideration, yet there must be something in the case before the State court which at least would call its attention to the Federal question as one relied upon by the party claiming it, and then even if the court did not notice the question, but the effect of its decision was a denial of the right claimed, it would be sufficient (*Dewey v. Des Moines*, *supra*; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581); but it is not enough that there be somewhere hidden away in the record a question which if raised would be of a Federal nature. *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904 (see Appeal from State to Supreme Court of the United States, *infra*, chapter 94).

## CHAPTER XXVIII.

### HOW THE FEDERAL QUESTION MUST APPEAR.

We have discussed where the Federal question must appear, and I now propose to briefly state how it must appear.

In *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2, it was held that if, from the plaintiff's bill or petition, it appears that in any aspect the case may assume the right of recovery may depend on the construction of a Federal statute, and such right is not a mere colorable claim, but rests on a reasonable foundation, then a Federal question is involved adequate to confer jurisdiction, though the case may be finally decided on other grounds. *St. Louis, I. M. & S. R. Co. v. Davis*, 132 Fed. 632; *Arkansas v. Choctaw & M. R. Co.* 134 Fed. 107; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509; *Huff v. Union Nat. Bank*, 173 Fed. 336; *Files v. Davis*, 118 Fed. 469, 470; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223. Whether the claim that a Federal question exists is well founded, when tried on its merits, does not affect jurisdiction, if as a matter of fact the statement in the case presented the Federal question as a real substantial issue. The court must take jurisdiction to determine whether the claim is valid or not, and having jurisdiction may decide all the issues (*Ibid.*; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168-178; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 45, 45 L. ed. 417, 21 Sup. Ct. Rep. 256), though it should appear at the trial there was no Federal question. *Ibid.*; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656.

But it is not to be understood that a mere reference in a bill to a Federal statute, and setting up a mere colorable claim thereunder, or the fact that it may be found necessary to consult or refer to some Federal statute to ascertain the meaning

of a contract, sets up a Federal question. *Illinois C. R. Co. v. Chicago*, 176 U. S. 656, 44 L. ed. 626, 20 Sup. Ct. Rep. 509; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Swafford v. Templeton*, 185 U. S. 487-493, 46 L. ed. 1005-1008, 22 Sup. Ct. Rep. 783; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 203, 24 L. ed. 658; *Wise v. Nixon*, 78 Fed. 203; *California Oil & Gas. Co. v. Miller*, 96 Fed. 18; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *St. Paul, M. & M. R. Co. v. St Paul & N. P. R. Co.* supra; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 452; *Devine v. Los Angeles*, 202 U. S. 313-332, 50 L. ed. 1046-1053, 26 Sup. Ct. Rep. 652.

To illustrate: Title to land may be derived from the Federal government, yet unless a construction of the granting power was necessary to decide a material issue in the case there would be no Federal question. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra; *California Oil & Gas Co. v. Miller*, 96 Fed. 17. Thus in a sale on execution issuing out of a Federal court, if only the title of the defendant, when the execution was levied, was assailed, there would be no Federal question, but otherwise if the validity of the writ is assailed. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505-507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; *Avery v. Popper*, 179 U. S. 314, 45 L. ed. 206, 21 Sup. Ct. Rep. 94; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 20 Mor. Min. Rep. 358; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Florida, C. & P. R. Co. v. Bell*, 176 U. S. 321-328, 44 L. ed. 486-490, 20 Sup. Ct. Rep. 399; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 195-196. See *Florida, C. & P. R. Co. v. Bell*, 31 C. C. A. 9, 59 U. S. App. 189, 87 Fed. 369. Or the validity of the lien of the judgment is in issue. *Cooke v. Avery*, 147 U. S. 375-390, 37 L. ed. 209-214, 13 Sup. Ct. Rep. 340. Or the title acquired under the lien. *Pierce v. Molliken*, 78 Fed. 196.

Again, where plaintiff claims lands from a grant by Congress, which is not denied, but the defense is that the lands in dispute are not covered by the grant, there is no Federal

question, but otherwise if the title is put in issue. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra; *Southern P. R. Co. v. Whittaker*, 47 Fed. 529; *Murray v. Bluebird Min. Co.* 45 Fed. 385. See *Butler v. Shafer*, 67 Fed. 161. So where there are conflicting claims to entries of public lands a Federal question is raised. *Linkswiler v. Schneider*, 95 Fed. 203. Or where there is a conflict of riparian rights in lands granted by the United States. *King v. St. Louis*, 98 Fed. 641; *Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 429-430. See *McGilyra v. Ross*, 90 C. C. A. 398, 164 Fed. 604. So conflicting claims to mining lands granted by the Federal government (*Cates v. Producers & C. Oil Co.* 96 Fed. 8), but where there is no dispute as to the meaning of the Federal law, but only as to which claim was first made, there is no Federal question. *California Oil & Gas. Co. v. Miller*, supra; *Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 114; *Hooker v. Los Angeles*, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395. See *Devine v. Los Angeles*, 202 U. S. 338, 50 L. ed. 1055, 26 Sup. Ct. Rep. 652; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 29 C. C. A. 462, 57 U. S. App. 13, 85 Fed. 867; *Argonaut Min. Co. v. Kennedy Min. & Mill. Co.* 84 Fed. 1; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 683, 37 L. ed. 611, 13 Sup. Ct. Rep. 771; *Budzisz v. Illinois Steel Co.* 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503; *Filhiol v. Torney*, 119 Fed. 974; *Gillis v. Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *McMillen v. Ferrun Min. Co.* 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

The mere fact that in the progress of a cause it becomes necessary to construe the Federal Constitution or laws does not make a Federal question; it must appear that the recovery sought is based on the construction to be given, and it is the substantial issue. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 38 L. ed. 513, 14 Sup. Ct. Rep. 654; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *Hanford v. Davies*, 163 U. S. 273-279, 41 L. ed. 157-159, 16 Sup. Ct. Rep. 1051; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199,



16 Sup. Ct. Rep. 34; *Hamblin v. Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *Wise v. Nixon*, supra; *Arkansas v. Kansas & T. Coal Co.* 96 Fed. 355, 356.

Cases involving the infringement of patents or copyrights raises a Federal question, but suits merely to recover the price if sold or the right to manufacture and sell the patented or copyrighted articles under a contract, and not involving the validity of the patent or copyright, does not raise a Federal question. *St. Paul Plough Works v. Starling*, 127 U. S. 378, 32 L. ed. 252, 8 Sup. Ct. Rep. 1327; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 260, 42 L. ed. 460, 18 Sup. Ct. Rep. 62; *Hartell v. Tilghman*, 99 U. S. 555, 25 L. ed. 360; *Marsh v. Nichols, S. & Co.* 140 U. S. 356, 35 L. ed. 417, 11 Sup. Ct. Rep. 798; *Albright v. Teas*, 106 U. S. 617, 27 L. ed. 297, 1 Sup. Ct. Rep. 550; *Densmore v. Three Rivers Mfg. Co.* 38 Fed. 750; *Montgomery Palace Stock-Car Co. v. Street Stable-Car Line*, 43 Fed. 331; *Silver v. Holt*, 84 Fed. 811. So with reference to national banks, a suit against directors for money loaned, alleged in a petition, raises no Federal question. *Bailey v. Mosher*, 74 Fed. 15, S. C. 95 Fed. 224, 46 C. C. A. 471, 107 Fed. 561. See *Gates v. Jones Nat. Bank*, 206 U. S. 158, 51 L. ed. 1002, 27 Sup. Ct. Rep. 638; *Bailey v. Mosher*, 11 C. C. A. 304, 27 U. S. App. 339, 63 Fed. 488. Nor title to national bank stock. *Leyson v. Davis*, 170 U. S. 40, 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 500.

But a suit on a bond of a cashier of a national bank is a Federal question. *Walker v. Windsor Nat. Bank*, 5 C. C. A. 421, 5 U. S. App. 423, 56 Fed. 80. So a suit by a receiver of a national bank against stockholders for stock assessment, does raise a Federal question. *Hayden v. Brown*, 94 Fed. 15. And such receiver may sue without reference to amount or citizenship. *Brown v. Smith*, 88 Fed. 565. A suit against a Federal receiver for acts of a former receiver does not raise a Federal question, *McNulta v. Lockridge*, 141 U. S. 329, 35 L. ed. 797, 12 Sup. Ct. Rep. 11, but suing a receiver without permission where required does raise a Federal question. *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 736, 737.

When full faith and credit are not given to the judgment of a sister State a Federal question is involved. U. S. Const S. Eq.—11.

art. 4, § 1; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 334, 40 L. ed. 989, 16 Sup. Ct. Rep. 810; *Andrews v. Andrews*, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; *Huntington v. Attrill*, 146 U. S. 683, 684, 36 L. ed. 1133, 1134, 13 Sup. Ct. Rep. 224; *Anglo-American Provision Co. v. Davis Provision Co.* 105 Fed. 536; *Carpenter v. Strange*, 141 U. S. 103, 35 L. ed. 646, 11 Sup. Ct. Rep. 960.

The construction of a State statute of limitation does not raise a Federal question. *Ludeling v. Chaffe*, 143 U. S. 305, 36 L. ed. 314, 12 Sup. Ct. Rep. 439; *Dupree v. Mansur*, 214 U. S. 161, 53 L. ed. 950, 29 Sup. Ct. Rep. 548; *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. Rep. 842. Nor the refusal of a trial by jury. *Iowa C. R. Co. v. Iowa*, 160 U. S. 393-394, 40 L. ed. 469, 16 Sup. Ct. Rep. 344. Nor whether a party acquired a right under a State land law before its withdrawal. *Bacon v. Texas*, 163 U. S. 209-219, 41 L. ed. 133-137, 16 Sup. Ct. Rep. 1023. Nor whether an ordinance of a city conforms to its charter. *Savannah v. Holst*, 65 C. C. A. 449, 132 Fed. 901-903; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

The Federal right claimed to raise a Federal question must be that of the plaintiff, and not a third person. *Ludeling v. Chaffe*, *supra*; *Giles v. Little*, 134 U. S. 645-649, 33 L. ed. 1062, 1063, 10 Sup. Ct. Rep. 623; *McCandless v. Pratt*, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 144. And in alleging the Federal question it is not necessary that the bill must show the particular clause of the Constitution, but the allegation must be positive, not argumentative. *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 148, 153, 154; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051. But if the whole theory of the case shows an impairment by statute of a contract, the Federal question may appear without mentioning the Constitution.

### *Receivers.*

Receivers appointed by Federal courts have heretofore been

held to have been fully within the class of Federal officers necessarily exercising powers derived from Federal authority, and could sue or be sued in the Federal courts by virtue of the Federal appointment. *Thompkins v. MacLeod*, 96 Fed. 927; *J. I. Case Plow Works v. Finks*, 26 C. C. A. 49, note; *Gilmore v. Herrick*, 93 Fed. 525; *Carpenter v. Northern P. R. Co.* 75 Fed. 850; *Gableman v. Peoria, D. & E. R. Co.* 101 Fed. 6, 7; *Bradley v. Ohio River & C. R. Co.* 119 N. C. 918, 78 Fed. 387. But it has now been fully determined that the appointment of a receiver by a Federal judge does not by virtue of his appointment raise a Federal question, so that if sued in a State court the case would be removable to a Federal court on the ground of a Federal question. *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171, S. C. 41 C. C. A. 160, 101 Fed. 6, 7; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *Marrs v. Felton*, 102 Fed. 778; *Yarnell v. Felton*, 104 Fed. 163; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 384, 48 L. ed. 490, 24 Sup. Ct. Rep. 325; *Pepper v. Rogers*, 128 Fed. 988. See "Removal by Receivers."

Prior to the act of 1888, section 3, a Federal receiver could not be sued out of the court appointing him, without special permission of the appointing court, but since said act a receiver may be sued in any court of competent jurisdiction, State or Federal, in respect to any act or transaction of the receiver in carrying on the business connected with the property held as receiver. *Ibid.* The act of 1888, section 3, is discussed hereafter under "Jurisdictional Amount" in suits by and against receivers, so I pass to another phase of the question.

## CHAPTER XXIX.

### ANTICIPATING FEDERAL QUESTION.

Having shown what is a Federal question, where and how it must appear, and how alleged, and its effect in giving jurisdiction to the Federal courts,—first, by writ of error to the Supreme Court of the United States; second, by original jurisdiction of the circuit courts, and by removal from State courts,—let us now discuss the right of the plaintiff to obtain jurisdiction in the Federal courts, by anticipating in his bill the defense of a Federal question upon which defendant will rest his case. *Cox v. Gilmer*, 88 Fed. 346; *Joy v. St. Louis*, 122 Fed. 524; *Filhiol v. Torney*, 119 Fed. 974; *Florida, C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Filhiol v. Torney*, 194 U. S. 356, 360, 48 L. ed. 1014, 1017, 24 Sup. Ct. Rep. 698; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 639, 47 L. ed. 631, 23 Sup. Ct. Rep. 434.

We have seen, to give jurisdiction to the Federal courts by reason of a Federal question, the Federal question must appear in plaintiff's statement of his own case. *Ibid.* The rule is fixed that plaintiff cannot invoke Federal jurisdiction by anticipating in his bill the defense of a Federal question, as, for instance, to set up that defendant will claim that a State statute is invalid under the Federal Constitution. This is not necessary to plaintiff's case. *Metcalf v. Watertown*, 128 U. S. 589, 32 L. ed. 544, 9 Sup. Ct. Rep. 173. See, also, *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 646, 47 L. ed. 635, 23 Sup. Ct. Rep. 440.

Judge Sanborn of the Eighth Circuit strongly combatted this position, and quotes in support of his dissenting opinion in *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 876, *Saginaw Gaslight Co. v.*

Saginaw, 28 Fed. 529; *Smith v. Bivens*, 56 Fed. 352, and other cases, 72 Fed. 880, which he contends clearly show that the plaintiff may raise the Federal question by anticipating the defense; and he claimed that 152 U. S., relied upon by the majority of the court, does not sustain the majority opinion.

If it is true, as broadly stated by some of the cases heretofore referred to, in discussing how the Federal question should appear, that if in any aspect the case may assume the right of recovery may depend on the construction of a Federal statute, a Federal question appears, then it seems Judge Sanborn has a basis for his conclusion. *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 2-12. See *Crystal Springs Land & Water Co. v. Los Angeles*, 76 Fed. 151-153; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90. But the rule is otherwise. The Federal question, to sustain jurisdiction, must be an existing one upon which plaintiff depends to sustain *his* suit, and not one that may or may not arise in the progress of the cause, as before said, to defeat his case. *Joy v. St. Louis*, *supra*. He cannot rest on the doubt as to whether it will be relied on or not. *Ibid.*; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47; *New Orleans v. Benjamin*, 153 U. S. 430, 38 L. ed. 771, 14 Sup. Ct. Rep. 905; *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 339, 341; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 639, 47 L. ed. 631, 23 Sup. Ct. Rep. 434; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 78, 44 L. ed. 680, 20 Sup. Ct. Rep. 545; *Peabody Gold Min. Co. v. Gold Hill Min. Co.* 49 C. C. A. 637, 111 Fed. 822, 21 Mor. Min. Rep. 591. The jurisdictional allegation must be in the case made in the bill. *Ibid.*; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Wise v. Nixon*, 78 Fed. 204; *Florida v. Charlotte Harbor Phosphate Co.* 20 C. C. A. 538, 41 U. S. App. 405, 74 Fed. 578; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35. But whatever may be the rule in a case of anticipation of the Federal question, when the answer comes in not setting up the Federal question,

the case should be dismissed at once. *Robinson v. Anderson*, 121 U. S. 522-524, 30 L. ed. 1021, 1022, 7 Sup. Ct. Rep. 1011; *Crystal Springs Land & Water Co. v. Los Angeles*, 82 Fed. 114, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Hooker v. Los Angeles*, 188 U. S. 318, 47 L. ed. 491, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 643, 47 L. ed. 633, 23 Sup. Ct. Rep. 434; *Devine v. Los Angeles*, 202 U. S. 338, 50 L. ed. 1055, 26 Sup. Ct. Rep. 652.

*Citizenship and Venue When Jurisdiction Rests on a Federal Question.*

*Citizenship.*—When the Federal question is a basis of jurisdiction, the citizenship of parties is not material. Citizens of the same State may sue each other where the recovery is based on a Federal question. *Patton v. Brady*, 184 U. S. 611, 46 L. ed. 715, 22 Sup. Ct. Rep. 493; *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 90 Fed. 520. The same rule applies to suits arising under treaties made by the United States (*Owings v. Norwood*, 5 Cranch, 344, 3 L. ed. 120); that is, where a right is given or protected by treaty.

*Venue.*—The suit can only be brought in the district whereof the defendant is an inhabitant (sec. 1, act 1888, see chapter 15) and this is true where the suit shows diversity of citizenship and a Federal question (*Newell v. Baltimore & O. R. Co.* 181 Fed. 698), and though the Federal question be added by amendment (*Ibid.*, 700, and cases cited).

*Issue, How Raised.*

The want of a Federal question in the statement of the case may be raised by demurrer, plea, or answer. *Fergus Falls v. Fergus Falls Water Co.* supra. Of course, if it does not appear, then a demurrer is proper to raise the issue. But if the Federal question appears in the bill, then you must raise the issue by plea or in your answer; however, it seems that unless in the trial of the plea it appears that the allegation of the Federal question was *fraudulently* made to acquire jurisdiction, that it will not affect the final jurisdiction to deter-

mine the case, though it appears upon the merits of the plea that no actual Federal question was involved. *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *Illinois C. R. Co. v. Adams*, 180 U. S. 38, 45 L. ed. 413, 21 Sup. Ct. Rep. 251.

The theory is that there is a distinction between the existence of a Federal question for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether the bill presents a Federal question, and whether it is well founded when considered on its merits, are different questions, and the court must take jurisdiction to determine whether it is well founded. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 178.

In *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681, it was held that the jurisdiction on the ground of a Federal question being asserted, jurisdiction is not defeated because in the trial it does not appear; wherefore a motion to dismiss because no Federal question exists cannot prevail. *Southern P. R. Co. v. California*, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 993; *Nashville, C. & St. L. R. Co. v. Taylor*, *supra*.

In *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223, it was held that jurisdiction must be taken to determine the fact as to whether the claim of the existence of a Federal question is meritorious; that is, it depended on the allegations in the bill, and not on the facts appearing subsequently. *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 204, 24 L. ed. 659. Of course, the claim must be real and colorable, not fictitious and fraudulent. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353. It is said in *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653, that all that is necessary to establish jurisdiction is to show that complainant had in good faith asserted the claim. *Fergus Falls v. Fergus Falls Water Co.* 12 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 883; *St. Paul, M. & M. R. Co. v. St. Paul, & N. P. R. Co.* *supra*. So then, to raise the issue by plea or answer it must be alleged that the allegation is fictitious and fraudulent, and it must be shown, or jurisdiction is not affected.

In the light of the fact that the Federal court is one of

limited jurisdiction, I cannot appreciate the soundness of the reasoning that makes a mere statement of a Federal question, though not true, sufficient to sustain jurisdiction. If it is a fundamental ground of jurisdiction, its existence, and not a mere allegation, should be shown. While the allegation and issue thereon may bring it within the jurisdiction to determine the particular issue, upon what rests the further power of the court to proceed after determining the fundamental ground does not exist? The decisions which hold that the suit should be dismissed seems to me to be the true construction, as it is the logical conclusion from the conditions (see *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 872; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* supra); that is, a want of power in a court of limited jurisdiction. Act Mch. 3d, 1875, § 5.

If you desire to demur, you may use the form given under diversity of citizenship.

If the allegation of the Federal question is sufficient, then you may plead or answer as follows:

A. B. } vs.    } C. D. }	In Equity	In Circuit Court of the United States for the.....District of ....., sitting at.....
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And now comes C. D., defendant (or C. D. and E. F., defendants, jointly and severally), and by protestation not confessing any of the matters in said bill contained, do plead thereto, and for cause of plea aver and say that this court should not take jurisdiction of this suit, for that the said suit does not really and substantially involve a suit or controversy properly within its jurisdiction, for that said suit is wholly based on the alleged existence of a Federal question, and the allegations that said suit is dependent on a construction of the constitution and laws of the United States (or whatever may be the allegations as to the Federal question), are not truly and in good faith made, but on the contrary, the averments in the bill as aforesaid are stated with the false and fraudulent purpose of imposing on the jurisdiction of this court. Wherefore defendant says that the allegations are fictitious and fraudulent.

All of which he avers to be true, and pleads the same in bar of complainant's said bill, and prays the judgment of this court whether he should answer, further pray to be hence dismissed with costs.

R. F.,  
Solicitor, etc.

Certificate of counsel and affidavit of defendants.

The same form may be used if the Federal question is denied in the answer.



## CHAPTER XXX.

### AMOUNT.

Equally important and fundamental as one of the elements of jurisdiction of the Federal courts is the amount or value of the subject-matter in litigation, and it is essential, though there be diversity of citizenship, or a Federal question. *Holt v. Indiana Mfg. Co.* 176 U. S. 72, 73, 40 L. ed. 376, 377, 20 Sup. Ct. Rep. 272; *United States v. Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371; *Tupino v. La Compañia General De Tabacos De Filipinas*, 214 U. S. 268, 53 L. ed. 992, 29 Sup. Ct. Rep. 610; *Shewalter v. Lexington*, 143 Fed. 161; *Fishback v. Western U. Teleg. Co.* 161 U. S. 99, 40 L. ed. 631, 16 Sup. Ct. Rep. 506.

The amount or value of the subject-matter or right being litigated must, under the act of 1888, exceed the sum of two thousand dollars, exclusive of interest and costs. Prior to this act the amount was only five hundred dollars, exclusive of costs. It was the purpose of Congress, in the act of 1888, to curtail the jurisdiction of the Federal courts. Under this act amount is material, except when the United States is a party, or citizens of the same State are claiming under a grant from a different State. *United States v. Reid*, 90 Fed. 522; *United States v. Sayward*, *supra*; *Risley v. Utica*, 168 Fed. 744; *Turner v. Jackson Lumber Co.* 87 C. C. A. 103, 159 Fed. 923-925; *Purnell v. Page*, 128 Fed. 496.

See New Code, chap. 2, sec. 24, par. 2, to 25, specifying cases in which amount is not essential to jurisdiction.

### *"Matter in Dispute."*

"The matter in dispute," as used in the statute, means the matter for which the suit in good faith is brought, and issue joined. *Smith v. Adams*, 130 U. S. 167-175, 32 L. ed. 895-898, 9 Sup. Ct. Rep. 566; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53-55; *Bruce v. Manchester & K.*

R. Co. 117 U. S. 514, 29 L. ed. 990, 6 Sup. Ct. Rep. 849; *Risley v. Utica*, 168 Fed. 747; *Union P. R. Co. v. Cunningham*, 173 Fed. 92; *Lee v. Watson*, 1 Wall. 339, 17 L. ed. 558; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 313; *Ung Lung Chung v. Holmes*, 98 Fed. 323; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 593; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 803; *Gorman v. Havird*, 141 U. S. 206, 35 L. ed. 717, 11 Sup. Ct. Rep. 943. And when jurisdiction depends on it, the matter in dispute must be capable of estimation in money (*Gaines v. Fuentes*, 92 U. S. 10-20, 23 L. ed. 524-528; *Schunk v. Moline, M. & S. Co.* 147 U. S. 504, 37 L. ed. 258, 13 Sup. Ct. Rep. 416), for when the matter is entirely incapable of pecuniary estimation, there can be no jurisdiction, as in a suit for the custody of a child. Amount in dispute and amount involved have the same legal significance. *Decker v. Williams*, 73 Fed. 310; *Reynolds v. Burns*, 141 U. S. 117, 35 L. ed. 648, 11 Sup. Ct. Rep. 942.

When the suit is for a money demand, the amount demanded in the body of the petition fixes the jurisdiction. *Peeler v. Lathrop*, 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 780; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 870; *Greene County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 801; *Hilton v. Dickinson*, 108 U. S. 165-174, 27 L. ed. 688-691, 2 Sup. Ct. Rep. 424; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 9; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Lee v. Watson*, *supra*; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 473; *Kunkel v. Brown*, *supra*; *Kearney County v. Vandriess*, 53 C. C. A. 192, 115 Fed. 872; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 742, 743; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 313; *State Bank v. Cox*, 74 C. C. A. 285, 143 Fed. 92.

When property is sued for, and the petition shows the value, it is taken as *prima facie* correct (*Bennett v. Butterworth*, 8 How. 128, 12 L. ed. 1015), and until it is in some way shown in the record that the sum stated is not the matter in controversy, it will be sufficient for jurisdiction. *King v. Southern R. Co.* 119 Fed. 1016; *Hilton v. Dickinson*, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; *Battle v. Atkinson*, 115

Fed. 384, 385. In a word, the court is governed by the claim made, provided there is no reason to believe that it was falsely made to obtain jurisdiction. *Ibid.*; *Holden v. Utah & M. Machinery Co.* 82 Fed. 209; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 6, 7; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 806; *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501. It is not essential to state the amount or value if it appears from the allegations or record or from evidence taken in the case before hearing on the jurisdiction. *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 804, 806. If apparently fraudulent, no jurisdiction will be taken. *American Wringer Co. v. Ionia*, 76 Fed. 6, 7; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *Green County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 802; *Simon v. House*, 46 Fed. 321; *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 614, 29 L. ed. 503, 6 Sup. Ct. Rep. 192; *Fishback v. Western U. Teleg. Co.* 161 U. S. 100, 40 L. ed. 631, 16 Sup. Ct. Rep. 506; *Vance v. W. A. Vandercook Co.* 170 U. S. 472, 42 L. ed. 1112, 18 Sup. Ct. Rep. 645; *Hampton Stave Co. v. Gardner*, 83 C. C. A. 521, 154 Fed. 806. The court looks to the record, which must create a legal certainty of want of jurisdictional amount. *Barry v. Edmunds*, 116 U. S. 559, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Waite v. Santa Cruz*, 184 U. S. 327, 46 L. ed. 568, 22 Sup. Ct. Rep. 327; *Kunkel v. Brown*, *supra*; *Interstate Bldg. & L. Asso. v. Edgefield Hotel Co.* 109 Fed. 692, 693; *Battle v. Atkinson*, 115 Fed. 385; *Bowman v. Chicago & N. W. R. Co.* 115 U. S. 611-613, 29 L. ed. 502, 503, 6 Sup. Ct. Rep. 192; *Bank of Arapahoe v. David Bradley & Co.* *supra*; *Hampton Stave Co. v. Gardner*, 83 C. C. A. 521, 154 Fed. 805. And if less than jurisdictional amount cannot be legally inferred from the bill the case must go to trial. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210. But the case should be dismissed if the evidence shows fraudulent statement of value to give jurisdiction (*Horst v. Merkley*, 59 Fed. 502; *Simon v. House*, 46 Fed. 318; *Bank of Arapahoe v. Bradley & Co.* *supra*); or that plaintiff cannot legally be permitted to sustain his claim (*North American Transp. & Trading Co. v. Morrison*, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869).

*Cases Classified.*

With these general observations I will now discuss the three classes of cases in which the question of amount as affecting jurisdiction has been raised.

First. Where a specific amount is sued for.

Second. When the value of the subject-matter or right in issue has been disputed.

Third. When the case sounds in damages.

*When a Specific Amount is Sued For.*

Under this head the specific amount sued for, or the amount recoverable under the allegations, is liquidated by the terms of the alleged agreement, and about this class of contracts there can be no difficulty (*Peeler v. Lathrop*; *Greene County Bank v. J. H. Teasdale Commission Co.*; *Hampton Stave Co. v. Gardner*; and *Bank of Arapahoe v. David Bradley & Co.*—*supra*; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Denver City Tramway Co. v. Norton*, 73 C. C. A. 1, 141 Fed. 599; *Ung Lung Chung v. Holmes*, and *Simon v. House*, *supra*; *Gray v. Blanchard*, 97 U. S. 565, 24 L. ed. 1109; *Schacker v. Hartford F. Ins. Co.* 93 U. S. 241–242, 23 L. ed. 862), unless the question arises when the original amount sued for had been reduced below the jurisdiction of the court by a payment of valid set-off. In such cases, if the plaintiff before bringing suit knew that his claim had been reduced by a valid payment, or some valid set-off, so that its extreme limit did not fall within the amount giving jurisdiction, then there is no jurisdiction, as it may be concluded that the amount as stated was for the sole purpose of getting jurisdiction. *Bedford Quarries Co. v. Welch*, 100 Fed. 513; *Pickham v. Wheeler-Bliss Mfg. Co.* 23 C. C. A. 391, 46 U. S. App. 605, 77 Fed. 663; *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 68; *Schunk v. Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 7. So, where land is sued for, over the value of two thousand dollars, and defendant disclaims as to all but a small portion under the value of two thousand dollars, it

would not affect the jurisdiction (*Way v. Clay*, 140 Fed. 352; *Alkire Grocery Co. v. Richesin*, 91 Fed. 84); but the facts must create a legal certainty of that conclusion (*Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Holden v. Utah & M. Machinery Co.* supra; *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Maffet v. Quine*, 95 Fed. 199; *Kunkel v. Brown*, supra).

It is not to be understood that jurisdiction is ousted because some defense may be made, or is made, which reduces the amount set up in the bill. *United States v. Swift*, 71 C. C. A. 351, 139 Fed. 227; *Kearny County v. Vandriss*, supra; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801-811; *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 314; *Ung Lung Chung v. Holmes*, 98 Fed. 326; *Kunkel v. Brown*, and *Tennent-Stribling Shoe Co. v. Roper*, supra; *Jones v. McCormick Harvesting Mach. Co.* 27 C. C. A. 133, 53 U. S. App. 408, 82 Fed. 295; *Jones v. Rowley*, 73 Fed. 288, 289. In fact, it was held, in *Schunk v. Moline, M. & S. Co.* supra, that a valid defense, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine the matter in dispute, for who can say in advance that the defense will be insisted on, or, if presented, will be sustained by the court? The rule may be stated, that if it is necessary, to ascertain the amount, to consider conflicting evidence as to claim of payment or set-off, or to decide disputed questions of law affecting the amount, then the court will take jurisdiction, even though on trial a less amount be found. *Ibid.*; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 7-9; *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 69.

Thus, in a suit in which various accounts have been aggregated to give jurisdiction, a court will take jurisdiction, even though some of the accounts be successfully attacked and the claim reduced below the jurisdiction. *Tennent-Stribling Shoe Co. v. Roper*, supra.

In Texas, as decided in *Lowe v. Dowbarn*, 26 Tex. 507, and *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093, it seems that if exceptions be taken to certain aggregated items, and they be sustained, and the amount is left below the jurisdiction,

the case will be dismissed. *Missouri, K. & T. R. Co. v. Kolbe*, 95 Tex. 76, 65 S. W. 34, see also *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806, 808. When the amount is reduced below the jurisdiction by the plea of limitations to certain of the aggregated items, this will not affect the jurisdiction, as limitation is a plea of privilege, which may or not be pleaded. *Hardin v. Cass County*, 42 Fed. 652-657; *Waterfield v. Rice*, 49 C. C. A. 504, 111 Fed. 625; *Kearny County v. Vaudriss*, 53 C. C. A. 192, 115 Fed. 867.

It appears, then, from the cases cited that it is not the amount plaintiff is able to prove when the jurisdictional amount is alleged, but was the demand made in good faith, and he has simply been mistaken as to the fact or the law. *Interstate Bldg. & L. Asso. v. Edgefield Hotel Co.* 109 Fed. 692; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 594; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 801; *Put-in-Bay Waterworks, Light & R. Co. v. Ryan*, 181 U. S. 432, 433, 45 L. ed. 938, 21 Sup. Ct. Rep. 709; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89; *Ung Lung Chung v. Holmes*, 98 Fed. 325.

By good faith is meant that the sum demanded is the real matter put in dispute (*Hilton v. Dickinson*, 108 U. S. 174, 27 L. ed. 691, 2 Sup. Ct. Rep. 424; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210), and not so manifestly fictitious as to make it legally certain that the amount alleged was only to get jurisdiction (*Jones v. McCormick Harvesting Mach. Co.* supra; *Battle v. Atkinson*, 115 Fed. 384), because clearly beyond a reasonable expectation of recovery (*Holden v. Utah & M. Machinery Co.* 82 Fed. 209; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867; *Kunkel v. Brown*, supra; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286).

Of course, in determining the bona fides of the allegation of amount, a plaintiff can be held to the knowledge of well-settled principles of law. So if an attempt is made to add an additional amount, which, under rules of law, would not be admissible, or something is set up easily susceptible of proof, and none is offered, or no satisfactory explanation given, then such a claim must be held to be fictitious. *Bank of Arapahoe v.*

David Bradley & Co. *supra*. But in *Holden v. Utah & M. Machinery Co.* *supra*, it is said it would require a very strong case to justify a court in finding that a plaintiff had no reasonable expectation of recovery of the amount as alleged. *Hayward v. Nordberg Mfg. Co.* *supra*; *Wetmore v. Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; see *Simon v. House*, 46 Fed. 318, collecting cases. If, however, the action is for a trespass, or otherwise sounding in damages, where no limitation is prescribed by law to the amount that may be recovered, then the estimate that plaintiff puts as his damages must control, as this fixes the demand in dispute, whatever may be the sum recovered. *Barry v. Edmunds*, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Herbert v. Rainey*, 54 Fed. 251; *Levinski v. Middlesex Bkg. Co.* 34 C. C. A. 452, 92 Fed. 458; *Smith v. Greenhow*, 109 U. S. 671, 27 L. ed. 1081, 3 Sup. Ct. Rep. 421. (See "Amount in Cases Sounding in Damages".)

## CHAPTER XXXI.

### AGGREGATING AMOUNTS.

When several persons have a common and undivided interest in a claim, and join in a suit, the amount of the joint claim fixes the jurisdiction. *Holt v. Bergevin*, 60 Fed. 2; *Wheless v. St. Louis*, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, 96 Fed. 867; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *McDaniel v. Traylor*, 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Thomas v. Green County*, 89 C. C. A. 405, 159 Fed. 341; *Hagge v. Kansas City S. R. Co.* 104 Fed. 393; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Gibson v. Shufeldt*, 122 U. S. 30-33, 30 L. ed. 1084, 1085, 7 Sup. Ct. Rep. 1066; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 455, 94 Fed. 739. See *Hartford F. Ins. Co. v. Erie R. Co.* 172 Fed. 899, 902; *Eaton v. Hoge*, 72 C. C. A. 74, 141 Fed. 66, 5 A. & E. Ann. Cas. 487. But if the interests are distinct, then they cannot join for convenience the several amounts due each, if the separate interests be less in amount than is necessary for jurisdiction. To join distinct interests, each interest must reach the jurisdictional amount. *Ibid.*; *Jones v. Mutual Fidelity Co.* 123 Fed. 510; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Risley v. Utica*, 168 Fed. 744; *McDaniel v. Traylor*, 123 Fed. 338; *Washington County v. Williams*, 49 C. C. A. 621, 111 Fed. 814; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 25, 35 L. ed. 332, 11 Sup. Ct. Rep. 691; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Citizens' Bank v. Cannon*, 164 U. S. 322, 41 L. ed. 452, 17 Sup. Ct. Rep. 89; *Wheless v. St. Louis*, *supra*; *Waite v. Santa Cruz*, 184 U. S. 328, 46 L. ed. 568, 22 Sup. Ct. Rep. 327; *Brown v. Denver*, 186 U. S. 480, 46 L. ed. 1259, 22 Sup. Ct. Rep. 943; *The*



Joseph B. Thomas, 78 C. C. A. 428, 148 Fed. 767. And this is true, though they join a class or party whose rights and liabilities arose out of the same transaction, or related to a common fund sought to be administered. *Ibid.*; *Clay v. Field*, *supra*; *Smithson v. Hubbell*, 81 Fed. 593, 594; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 56; *Chatfield v. Bogle*, 105 U. S. 233, 26 L. ed. 945; *Russell v. Stansell*, 105 U. S. 304, 26 L. ed. 990; *Seaver v. Bigelow*, 5 Wall. 210, 211, 18 L. ed. 595, 596; *Putney v. Whitmire*, 66 Fed. 387. It may be a common fund involved in the litigation which exceeds the jurisdictional amount, but if each creditor can only recover the amount due him out of the fund, and said amounts are less than the jurisdictional amount, then the case should be dismissed. *Gibson v. Shufeldt*, 122 U. S. 35, 30 L. ed. 1086, 7 Sup. Ct. Rep. 1066; *Russell v. Stansell*, 105 U. S. 303, 26 L. ed. 989. There is a conflict of authorities on this proposition. See *Jacobs v. Mexican Sugar Co.* 130 Fed. 591. Thus, a bill by a stockholder in behalf of himself and others must show the value of the stock held by him equals the jurisdictional amount, or exceeds it. *Smithson v. Hubbell*, 81 Fed. 593; *Harvey v. Raleigh & G. R. Co.* 89 Fed. 117, 118.

The rule, however, does not apply to assignments for the benefit of creditors, if the application is to protect the fund and enforce an execution of the trust, as in such cases the fund, and not plaintiff's demand, gives the jurisdiction. *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; *Jones v. Mutual Fidelity Co.* 123 Fed. 513-515; *Towle v. American Bldg. Loan & Invest Soc.* 60 Fed. 131; *Putnam v. Timothy Dry Goods & Carpet Co.* 79 Fed. 454; *Colston v. Southern Home Bldg. & L. Asso.* 99 Fed. 305; *Estes v. Gunter*, 121 U. S. 183, 30 L. ed. 884, 7 Sup. Ct. Rep. 854. So in proceeding against insolvent corporations. *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 450; *Jones v. Mutual Fidelity Co.* 123 Fed. 506. (See "Creditors Suit.")

A single plaintiff cannot join several defendants, against whom he has claims of a similar character, in order to reach the jurisdictional amount. The claim against each defendant must be of the jurisdictional amount to be joined if a joint judgment cannot be taken. *McDaniel v. Traylor*, 123 Fed. 339, see 196 U. S. 415-427, 49 L. ed. 533-538, 25 Sup. Ct.

Rep. 369; *Busey v. Smith*, 67 Fed. 15, 16; *Henderson v. Wadsworth*, 115 U. S. 276, 29 L. ed. 379, 6 Sup. Ct. Rep. 140; *Walter v. Northeastern R. Co.* 147 U. S. 376, 37 L. ed. 208, 13 Sup. Ct. Rep. 348; *Seaver v. Bigelow*, 5 Wall. 208, 18 L. ed. 595; *Gibson v. Shufeldt*, 122 U. S. 27, 30 L. ed. 1083, 7 Sup. Ct. Rep. 1066; *Shewalter v. Lexington*, 143 Fed. 163, 164; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Ex parte Phoenix Ins. Co.* 117 U. S. 367-369, 29 L. ed. 923, 924, 6 Sup. Ct. Rep. 772. Thus, you cannot aggregate amount against several insurance companies. *Wisconsin C. R. Co. v. Phoenix Ins. Co.* 123 Fed. 989. The rule applicable to several plaintiffs having separate claims that each must be in the jurisdictional amount is applicable when several defendants were sued. *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348. When claims of various parties have been assigned to one party such party can aggregate the amounts for the purpose of jurisdiction, provided the assignors, by reason of diversity of citizenship, could have sued in the Federal courts, if the amount had been jurisdictional. *Chase v. Sheldon Roller Mills Co.* 56 Fed. 625; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 752; *Bergman v. Inman*, 91 Fed. 294; *Brigham-Hopkins Co. v. Gross*, 107 Fed. 769; *Davis v. Mills*, 99 Fed. 40. (See "Jurisdiction by Assignment.")

*What may be Included in Amount to Give Jurisdiction.*

As stated by the judiciary act, the *matter in dispute* must exceed, exclusive of interest and costs, the sum or value of two thousand dollars. In making up the amount it has been decided that you cannot add mere items of expense in connection with the cause of action, unless it was agreed between the parties that the expense was to be incurred, or from the nature of the contract could be reasonably implied. *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 471. There was, however, a vigorous dissenting of opinion to the application of the rule in this particular case. You can add attor-

neys' fees when a part of the contract. *Rogers v. Riley*, 80 Fed. 762; *Swofford v. Cornucopia Mines*, 140 Fed. 958.

You cannot, however, sue on a bond or other written instrument to pay money, and add to it damages for a breach, in order to make the amount jurisdictional. *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 473; *Hilton v. Dickinson*, 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424. The rule seems to be that where the law gives no rule that fixes the damage in any particular case, then the plaintiff's demand must furnish the basis of jurisdiction; but when the law does give a rule, as interest, then the cause of action must control, and not the demand. *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Barry v. Edmunds*, 116 U. S. 550-556, 29 L. ed. 729-731, 6 Sup. Ct. Rep. 501; *Simon v. House*, 46 Fed. 321. Thus in cases of debt evidenced by written instruments, interest is the damage permitted by law, and the character of demand cannot be added to by alleging any further damage in order to increase the amount. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501.

So in cases of contract where the amount recoverable is liquidated by the terms of the agreement, the limit of recovery is fixed, and you cannot add to it to obtain jurisdiction. *Lee v. Watson*, 1 Wall. 339, 17 L. ed. 558; *Bergman v. Inman*, 91 Fed. 293; *Kunkel v. Brown*, 39 C. C. A. 665, 99 Fed. 595.

In this character of cases the sum demanded beyond what the law or parties have fixed as the limit of recovery is clearly the matter in dispute (*Bowman v. Chicago & N. W. R. Co.* 115 U. S. 614, 29 L. ed. 503, 6 Sup. Ct. Rep. 192; *Barry v. Edmunds*, 116 U. S. 550-556, 29 L. ed. 729-731, 6 Sup. Ct. Rep. 501), but you may bring suit on notes due, and those not due, arising out of the same transaction, and thus acquire the jurisdictional amount. In suits upon bonds and coupons, the interest on them cannot be added. *Greene County v. Kortrecht*, 26 C. C. A. 381, 52 U. S. App. 250, 81 Fed. 241, and authorities cited. But it seems you may include matured coupons in making jurisdictional amount, as they are separable independent promises, and not interest within the meaning of

the statute. *Edwards v. Bates County*, 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. Rep. 967; *Home & F. Invest. & Agency Co. v. Ray*, 69 Fed. 657,—overruled; *Independent School Dist. v. Reid*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 4.

### *Foreclosure of Mortgage.*

Falling within the rule, the specific amount sued for controls the jurisdiction on foreclosures of chattel mortgages, and not the value of the property mortgaged. *Stillwell-Bierce & S. V. Co. v. Williamston Oil & Fertilizer Co.* 80 Fed. 68; *Wakeman v. Throckmorton*, 124 Fed. 1010; *Gibson v. Shufeldt*, 122 U. S. 29, 30 L. ed. 1084, 7 Sup. Ct. Rep. 1066; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89; *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 130, 36 L. ed. 640, 12 Sup. Ct. Rep. 815. But you may aggregate several notes and mortgages against the same party. *Fitchett v. Blows*, 20 C. C. A. 286, 36 U. S. App. 597, 74 Fed. 49; *Fitch v. Creighton*, 24 How. 159, 16 L. ed. 596; *O'Connel v. Reed*, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 531. The rule has been declared otherwise in Texas, that is, the value of the property upon which foreclosure is sought determines jurisdiction. *Texas & N. O. R. Co. v. Rucker*, 38 Tex. Civ. App. 591, 88 S. W. 816.

### *Creditors' Suits.*

The amount claimed by the creditor, and not the value of the property, determines jurisdiction. *Alkire Grocery Co. v. Richesin*, 91 Fed. 84 and authorities cited; *Jacobs v. Mexican Sugar Co.* 130 Fed. 591; *Werner v. Murphy*, 60 Fed. 769; *Putney v. Whitmire*, 66 Fed. 387. The only interest of the creditor is his individual claim, for if paid it destroys his interest, and this must test the matter in controversy. *Ibid.*

Creditors cannot unite their interests to make the jurisdictional amount (*Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163), but may in good faith assign their interests to one who may aggregate the claims to obtain the jurisdictional amount (*Alkire Grocery Co. v. Richesin*, *supra*; *Putney v. Whitmire*, 66 Fed. 385; *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Marion v. Ellis*,

10 Fed. 410; *Collinson v. Jackson*, 8 Sawy. N. Y. 357, 14 Fed. 309). But if one complainant in a creditors' suit has recovered a judgment for over two thousand dollars, other creditors holding smaller judgments may unite with him in the suit. *Huff v. Bidwell*, 81 C. C. A. 43, 151 Fed. 564, 103 Fed. 363; *Stanwood v. Wishard*, 134 Fed. 959; *Belmont Nail Co. v. Columbia Iron & Steel Co.* 46 Fed. 337.

## CHAPTER XXXII.

### BY AND AGAINST FEDERAL RECEIVERS.

Prior to the act of 1888, section 3, suits could only be brought against Federal receivers by permission of the court appointing the receiver. *Barton v. Barbour*, 104 U. S. 128, 26 L. ed. 674. Such suits were considered purely ancillary to the main suit (*Porter v. Sabin*, 36 Fed. 477; *Missouri P. R. Co. v. Texas P. R. Co.* 41 Fed. 313; *Gilmore v. Herrick*, 93 Fed. 526), and fell within the jurisdiction of the appointing court, without reference to amount or citizenship. (*Carpenter v. Northern P. R. Co.* 75 Fed. 850; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 118 Fed. 204; *Hampton Roads R. & Electric Co. v. Newport News & O. P. R. & Electric Co.* 131 Fed. 534.)

But since the act of 1888, section 3, which permits suits against a Federal receiver in any court of competent jurisdiction, without the consent of the appointing court, in respect to *any act or transaction* of the receiver in carrying on the business connected with such property, the right of plaintiff to select his own court having jurisdiction of the subject-matter (except as modified by the removal act, *Tompkins v. MacLeod*, 96 Fed. 927; *Marrs v. Felton*, 102 Fed. 775, 776) was secured. See sec. 66, New Code, chap. 4, embodying sec. 3, act of 1888.

Federal courts could no longer draw to themselves jurisdiction of suits against their receivers by process of contempt, or injunction. *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. 523; *Gilmore v. Herrick*, *supra*. And suits thus brought were no longer in the class of ancillary suits, but became original suits against the receiver, in which the amount, and some Federal ground of jurisdiction, became material to jurisdiction. *Ibid.*; *Ray v. Pierce*, 81 Fed. 881, 882; *Pitkin v. Cowen*, 91 Fed. 599; *Tompkins v. MacLeod*, *supra*; *Gable*

man v. Peoria, D. & E. R. Co. 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171; Pepper v. Rogers, 128 Fed. 988; Carpenter v. Northern P. R. Co. *supra*; and Sullivan v. Barnard, 81 Fed. 886, held a contrary doctrine, but it is not the rule as now administered.

You will notice, however, that the language of the act is, that where the suit is in respect of *any act* or transaction of the receiver (McNulta v. Lochridge, 141 U. S. 331, 35 L. ed. 799, 12 Sup. Ct. Rep. 11) in the administration of the trust, then the receiver can be sued in any court of competent jurisdiction, and it is in such cases amount is important. Coster v. Parkersberg Branch R. Co. 131 Fed. 115; Pitkin v. Cowen, 91 Fed. 602; Royal Trust Co. v. Washburn, B. & I. R. R. Co. 113 Fed. 532; Re Kalb & B. Mfg. Co. 165 Fed. 896; Love v. Louisville & E. R. Co. 178 Fed. 507.

An action in a State court against a receiver for damages for personal injuries arises under the general law of liability for damages, and comes within the above rule. *Ibid.*; Gableman v. Peoria, D. & E. R. Co. 179 U. S. 340, 341, 45 L. ed. 223, 224, 21 Sup. Ct. Rep. 171, 41 C. C. A. 160, 101 Fed. 6; Shearing v. Trumbull, 75 Fed. 33; Bausman v. Dixon, 173 U. S. 113, 114, 43 L. ed. 633, 634, 19 Sup. Ct. Rep. 316; Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co. 192 U. S. 384, 48 L. ed. 490, 24 Sup. Ct. Rep. 325; Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854. So, where an action is brought by a receiver in a Federal court, other than that of its appointment, then amount is jurisdictional. Sullivan v. Swain, 96 Fed. 259.

There are still many suits that arise in the administration of a Federal receivership that are only ancillary, and which are not suits in respect of any act or transaction of the receiver. In such suits the matter of *amount* and citizenship does not affect the jurisdiction of the Federal court appointing the receiver. Thus, where a receiver in administering his trust, brings an action in the court appointing him in aid of his trust, the matter of amount is not important, neither is citizenship. White v. Ewing, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018; Brown v. Allebach, 156 Fed. 697; Rause v. Letcher, 156 U. S. 49, 53, 39 L. ed. 342, 343, 15 Sup. Ct. Rep. 266; Gunby v. Armstrong, 66 C. C. A. 627, 133 Fed.

417; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Bottom v. National R. Bldg. & L. Asso.* 123 Fed. 745; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Bowman v. Harris*, 95 Fed. 917; *Gilmore v. Herrick*, *supra*.

Thus, a receiver may recover assets in the hands of others, if there is no right asserted by the party in possession adverse to the claim of the receiver without reference to the value of the asset. *Ibid*.

Or when he seeks to foreclose a mortgage in behalf of the fund by order of the court. *Gunby v. Armstrong*, *supra*; *American Loan & T. Co. v. Central Vermont R. Co.* 86 Fed. 390; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497.

Or when it is sought to deal with the property in the hands of the court to subject it to sale, or because of some claim or right in and to the property thus situated. *Gilmore v. Herrick*, *supra*; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 735; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182; *New Orleans v. Howard*, 87 C. C. A. 345, 160 Fed. 393.

Or on any cause of action not arising out of any act of the receiver in carrying on the business of the receivership. *Porter v. Sabin*, 149 U. S. 479, 37 L. ed. 818, 13 Sup. Ct. Rep. 1008; *Compton v. Jesup*, *supra*; *Buckhannon & N. R. Co. v. Davis*, 68 C. C. A. 345, 135 Fed. 707.

So in receiverships of national banks, where jurisdiction is specially reserved by the act of 1888, where amount is not important when necessary to sue. Sec. 4, act 1888; *Earle v. McCartney*, 109 Fed. 13; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370. (See *Smithson v. Hubbell*, 81 Fed. 593). (See "Receivers as Parties").



## CHAPTER XXXIII.

### AMOUNT IN INJUNCTIONS.

So far the preceding chapters have dealt with the amount or value of the subject-matter in issue that could be recovered by law as the measure of jurisdiction; but this is not the general rule applicable to injunctions; while there is a large class of cases where the direct pecuniary loss sought to be prevented by injunction would be the measure, and not contingent loss,—as, where one seeks to enjoin an execution for an amount less than two thousand dollars as in *Ross v. Prentiss*, 3 How. 772, 11 L. ed. 824, where jurisdiction was denied. *New England Mortg. Secur. Co. v. Gay*, 145 U. S. 130, 131, 36 L. ed. 648, 649, 12 Sup. Ct. Rep. 815; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53.

Or where the individual taxpayer seeks to restrain the issue of bonds by a city, and his personal interest is less than the jurisdictional amount, the jurisdiction fails. *Purnell v. Page*, 128 Fed. 496, 498, and authorities cited; *Colvin v. Jacksonville*, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; *El Paso Water Co. v. El Paso*, 152 U. S. 157, 38 L. ed. 396, 14 Sup. Ct. Rep. 494.

See *Ottumway v. City Water Supply Co.* 59 L.R.A. 604, 56 C. C. A. 219, 119 Fed. 318; *Helena v. Helena Waterworks Co.* 97 C. C. A. 320, 173 Fed. 18; *Holt v. Indiana Mfg. Co.* 176 U. S. 72, 44 L. ed. 376, 20 Sup. Ct. Rep. 272; *Coulter v. Fargo*, 62 C. C. A. 444, 127 Fed. 912.

So where the tax sought to be enjoined is on land, it would be the amount of the tax, and not the value of the land, necessary to support jurisdiction. *Ibid.*; *Douglas v. Stone*, 110 Fed. 812, 815; *Eachus v. Hartwell*, 112 Fed. 564; *Turner v. Jackson Lumber Co.* 87 C. C. A. 106, 159 Fed. 926, and authorities cited.

So, where adjoining owners of lots unite to enjoin the tax

upon their lots, the assessment of each must be over two thousand dollars. *Ibid.*; *Wheless v. St. Louis*, 180 U. S. 379, 45 L. ed. 583, 21 Sup. Ct. Rep. 402, 96 Fed. 866; *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; *Walter v. Northeastern R. Co.* 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; *Citizens' Bank v. Cannon*; 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98.

So where it is sought to enjoin the payment of a dividend, the amount of plaintiff's claim must govern. *Smithson v. Hubbell*, 81 Fed. 593; *Clay v. Field*, 138 U. S. 464-483, 34 L. ed. 1044-1051, 11 Sup. Ct. Rep. 419.

So, a stockholder suing must rest upon his individual holding for jurisdiction, where he is seeking to recover a personal judgment against a corporation.

But there is a class of injunctions where the value of the right to be protected is much greater than the value of the property about which the dispute originated, and in which the value of the right to be protected or the extent of the injury to be prevented fixes the jurisdiction without reference to the amount that may be recovered by law. *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 1; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Anderson v. Bassman*, 140 Fed. 14; *Evenson v. Spaulding*, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; *Board of Trade v. Cella Commission Co.* 76 C. C. A. 28, 145 Fed. 28, 29; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399; *Humes v. Ft. Smith*, 93 Fed. 857; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 743.

To illustrate: In *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, the railroad company sought to enjoin one Kuteman from prosecuting in a state court a number of small suits for penalties for overcharges for freight. The court held the maintenance of the schedule rate was a right to be protected, and being the real matter in dispute, and of a value exceeding two thousand dollars, the court had jurisdiction. The value of the object to be obtained and the right to be protected controls, says the court. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 5.

So we have had many suits to enjoin railroad companies from establishing a new schedule of rates, where the value of the right was only considered as the basis of jurisdiction, as in *Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso.* 91 C. C. A. 39, 165 Fed. 2-11; *Chesapeake & D. Canal Co. v. Gring*, 86 C. C. A. 539, 159 Fed. 662; *Southern P. Co. v. Bartine*, 170 Fed. 765.

So the property right of a board of trade in its market quotations is the basis of jurisdictional value, when an injunction is sought to protect it. *Board of Trade v. Cella Commission Co.* supra; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 31.

So in restraining brokerage in railway tickets. *Nashville, C. & St. L. R. Co. v. McConnell*, supra; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co.* 119 Fed. 948; *Louisville & N. R. Co. v. Bitterman*, 128 Fed. 176, 178n, 75 C. C. A. 192, 144 Fed. 44, 207 U. S. 222, 223, 52 L. ed. 182, 183, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693; *Pennsylvania Co. v. Bay*, 138 Fed. 203.

In *Lanning v. Osborn*, 79 Fed. 661, it was held that in a suit to enjoin the interference with the water rates of a city, the right to fix rates and its value determined jurisdiction, and not the difference between the annual rate contended for by the defendant and that asserted by the plaintiff. *Board of Trade v. Cella Commission Co.* 145 Fed. 28.

So where injunctions are sued out to prevent destruction or injury to property, the jurisdiction is ordinarily fixed by the value of the property to be protected. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 1; *Maffet v. Quine*, 95 Fed. 199; *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

But the allegations of damage, actual or exemplary, in such cases, will sustain jurisdiction. *Maffet v. Quine*, 95 Fed. 200; *Von Schroeder v. Brittan*, 93 Fed. 9, 10; *Herbert v. Rainey*, 54 Fed. 248.

In a suit to prevent a permanent injury to land, the value of the land determines amount. *Re Turner*, 119 Fed. 231.

So in a suit for an injunction to restrain diversion of water from plaintiff's land, against several defendants, the injury

as a whole to the land, and not the claim for damages against each individual defendant, was the test of the jurisdictional amount. *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 327. See *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73. *Morris v. Bean*, 146 Fed. 423-429, placed the jurisdiction on the value of the right. 123 Fed. 618.

So the owner of a house has a distinct right of property in streets; and any interference with the right may be enjoined, and the value of the right determines jurisdiction. *American Steel & Wire Co. v. Wire Drawers & D. M. Unions Nos. 1 & 3*, 90 Fed. 608-613.

So in any interference with easements. *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 3, and authorities cited.

The owner of a large body of land sought to protect it from stock owners and neighborhood cattle, and the value of the pasturage to be protected, and not the claims against each owner, was the basis of jurisdiction. *Northern P. R. Co. v. Cunningham*, 103 Fed. 708; *Smith v. Bivens*, 56 Fed. 352.

But where property is injured by the overflow of a stream caused by unlawful or negligent construction, the landowners may unite in a suit for injunctive relief, but the injury to each must be of the jurisdictional amount. *Hagge v. Kansas City, S. R. Co.* 104 Fed. 391; *Kenyon v. Knipe*, 46 Fed. 310; *Clay v. Field*, 138 U. S. 464, 34 L. ed. 1044, 11 Sup. Ct. Rep. 419; *Citizens' Bank v. Cannon*, 164 U. S. 319, 41 L. ed. 451, 17 Sup. Ct. Rep. 89.

An injunction was sought to protect the alleged right of plaintiff to import liquors into South Carolina, the right being valued over the value of liquors sought to be imported, the jurisdiction was taken on the value of the right. *Scott v. Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

An injunction having for its object the abatement of a nuisance or removal of an obstruction, the jurisdictional amount is based on the right, and not the amount of damage suffered by the complainant. *American Fisheries v. Lennen*, 118 Fed. 872; *Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311; *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 14 A. & E. Ann. Cas. 8; *Amelia Mill Co. v. Tennessee Coal, Iron & R. Co.* 123 Fed. 811; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 25 L. ed. 782;

Whitman v. Hubbell, 30 Fed. 81; Rainey v. Herbert, 5 C. C. A. 183, 3 U. S. App. 592, 55 Fed. 443.

An injunction to restrain interference with a contract would be the value of the right to be protected, and not the amount involved in the contract; as, enjoining ticket brokers from buying and selling tickets issued by railroads, as before stated, and authorities cited. So in a suit by a property owner and taxpayer against a city and bidder to prevent a contract, it would be the value of the contract, and not amount of tax, that would give jurisdiction. Johnston v. Pittsburg, 106 Fed. 753. See Murphy v. East Portland, 42 Fed. 308.

Again, the value of the right to pursue one's business without being subjected to an onerous tax, and a multiplicity of suits for penalties, and not the amount of the illegal tax, fixes the jurisdictional amount for injunction. Hutchinson v. Beckham, 55 C. C. A. 333, 118 Fed. 399, 402; Whitman College v. Berryman, 156 Fed. 112-114; Humes v. Ft. Smith, 93 Fed. 857.

The last cases cited must be differentiated from those where it is apparent that the complainant can sustain no other damage than the payment of the tax, and the amount of the tax must be the basis for jurisdiction, as in Walter v. Northeastern R. Co. 147 U. S. 370, 37 L. ed. 206, 13 Sup. Ct. Rep. 348; Northern P. R. Co. v. Walker, 148 U. S. 391, 37 L. ed. 494, 13 Sup. Ct. Rep. 650; Eachus v. Hartwell, 112 Fed. 564; Purnell v. Page, 128 Fed. 498; Turner v. Jackson Lumber Co. 159 Fed. 923. In the rule under consideration and the cases sustaining it, the injunction sought was to protect a right which was the "matter in dispute," and not the particular tax.

In protecting a business by injunction, past and prospective injury fixes the jurisdictional amount. Draper v. Skerrett, 116 Fed. 206; Evenson v. Spaulding, 9 L.R.A.(N.S.) 904, 82 C. C. A. 263, 150 Fed. 517; Butchers' & D. Stock-Yards Co. v. Louisville & N. R. Co. 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 35; Rocky Mountain Bell Teleph. Co. v. Montana Federation of Labor, 156 Fed. 809; Board of Trade v. Cella Commission Co. 76 C. C. A. 28, 145 Fed. 29; Hunt v. New York Cotton Exch. 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529, 144 Fed. 511.

So in enjoining a business that parties agreed not to carry on, the value of the right to be protected, and not the loss that may have been occasioned, fixes the jurisdiction. *Ibid.*; *McFee v. Chautauqua Assembly*, 124 Fed. 808-811; *Board of Trade v. Cella Commission Co.* *supra*.

So, on enjoining infringement of a trademark, the value of the trademark, and not the damage sustained, is the jurisdictional amount. *Hennessy v. Herrmann*, 89 Fed. 669; *De Kuyper v. Witteman*, 23 Fed. 871. See *Winchester Repeating Arms Co. v. Butler Bros.* 128 Fed. 978, holding that the amount of the damages claimed would be the jurisdictional amount. *Symonds v. Greene*, 28 Fed. 834.

## CHAPTER XXXIV.

### VALUE OF SUBJECT-MATTER OR RIGHT IN ISSUE IN SPECIFIC REMEDIES.

To ascertain the value of the "matter in dispute" or subject-matter of the litigation, where jurisdiction depends on amount in controversy, resort must be had to the character of the action. *Simon v. House*, 46 Fed. 318.

In all suits for the specific recovery of property, the value of the property in issue is the measure of jurisdiction, and ordinarily presents no practical difficulty. Thus, in trying title to land or the interest of plaintiff in property, real or personal, the value of the property or interest is easily ascertained (*Bennett v. Butterworth*, 8 How. 128, 129, 12 L. ed. 1015, 1016; *Simon v. House*, supra; *Way v. Clay*, 140 Fed. 352; *King v. Southern R. Co.* 119 Fed. 1016; *Insurance Co. of N. A. v. Srendson*, 74 Fed. 347; *Vicksburg, S. & P. R. Co. v. Smith*, 135 U. S. 195, 34 L. ed. 95, 10 Sup. Ct. Rep. 728; *Smithers v. Smith*, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297; *Butters v. Carney*, 127 Fed. 623), and the value alleged controls, unless so grossly excessive as to evidence a want of good faith in the allegation (*Ibid.*; *Vance v. W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210).

Some difficulty arises, however, in enforcing purely equitable remedies, such as injunctions, specific performance, cancellation, and rescission, quieting title, or removing cloud, and in appointing receivers, in ascertaining the value of the right claimed as controlling jurisdiction.

#### *Specific Performance.*

**In a suit to enforce performance of a contract to convey**

land, the value of the land to be conveyed as alleged fixes the jurisdictional amount, unless fraudulent and fictitious. *Johnston v. Trippe*, 33 Fed. 530. See *Marthinson v. King*, 82 C. C. A. 360, 150 Fed. 49.

### *Cancelation and Rescission.*

In *Simon v. House*, 46 Fed. 317, it is held that a suit brought to cancel certain instruments conveying real estate casting a cloud on title, that the amount considered in determining jurisdiction is the value of the land affected; it is based on the theory that the whole value of the property, the possession and enjoyment of which is imperiled, is involved in the controversy, and not limited to the pecuniary value of the instrument in controversy. *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* 43 Fed. 545. See *Gordon v. Smith*, 10 C. C. A. 516, 23 U. S. App. 451, 62 Fed. 503; and see "Quiet-ing Title." *Stinson v. Dousman*, 20 How. 466, 15 L. ed. 969.

When suit is brought to cancel a mortgage, the amount in dispute is the amount or value which complainant claims to recover, or which defendant will lose if plaintiff recovers. *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53, reversing 96 Fed. 770; *Fidelity & D. Co. v. Moshier*, 151 Fed. 807; *Riggs v. Clark*, 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 560; *Dickinson v. Union Mortgage Bkg. & T. Co.* 64 Fed. 895. But this would not be the rule if complainant owned the whole property and was contesting claims against it, for then the value of the property to be protected would be the amount in dispute. *Berthold v. Hoskins*, 38 Fed. 772; *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566. See *Cowell v. City Water Supply Co.* supra, for distinction drawn by Judge Thayer.

So, to cancel judgments rendered by a court against different defendants, they cannot aggregate the judgments to come within the jurisdiction, no one judgment exceeding two thousand dollars; nor can the value of the real estate upon which the judgments are liens be taken into consideration. *McDaniel v. Traylor*, 123 Fed. 338, reversed in 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Walter v. Northeastern R. Co.*



147 U. S. 373, 37 L. ed. 208, 13 Sup. Ct. Rep. 348. As to amount in canceling a lease, see *Reese v. Zinn*, 103 Fed. 97.

*Quieting Title or Removing Cloud.*

In quieting title or removing cloud, the amount in dispute is the actual value of the land affected, and not the value of defendant's claim. *Smith v. Adams*, supra; *Woodside v. Ciceroni*, 35 C. C. A. 177, 93 Fed. 4; *Shewalter v. Lexington*, 143 Fed. 166; *Greenfield v. United States Mortg. Co.* 133 Fed. 785; *McDaniel v. Traylor*, 196 U. S. 416, 49 L. ed. 535, 25 Sup. Ct. Rep. 369; *Cowell v. City Water Supply Co.* supra; *Union P. R. Co. v. Cunningham*, 173 Fed. 90; *Simon v. House*, 46 Fed. 318; *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* supra; *Lovett v. Prentice*, 44 Fed. 459.

In *Cooper v. Preston*, 105 Fed. 403, it is said that a suit to quiet title, against a number of defendants, of land of the jurisdictional value, it must appear that all defendants have a privity of interest derived from a common source of title, or the separate claim of each must be of the jurisdictional amount. *Bates v. Carpentier*, 98 Fed. 452. See *Parker v. Morrill*, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14, as to the value of the interest of plaintiff.

In setting aside a tax title the value of the land, not the tax involved, fixes the jurisdiction. *Felch v. Travis*, 92 Fed. 210. But to enjoin the tax, as we have seen, would be the amount of tax, and not value of land. *Douglas Co. v. Stone*, 110 Fed. 814; *Purnell v. Page*, 128 Fed. 496; *Shewalter v. Lexington*, 143 Fed. 161.

If, however, the suit is against various defendants having distinct claims of title to a parcel of land, then the value of each distinct parcel must exceed two thousand dollars. *Cooper v. Preston*, supra; *Bates v. Carpentier*, 98 Fed. 452; *Stemmler v. McNeill*, 102 Fed. 660. See *Carothers v. McKinley Min. & Smelting Co.* 116 Fed. 947.

The rule that each plaintiff must be competent to sue, and each defendant competent to be sued, is applied (*Ibid.*), but if the interest of the various defendants is undivided and common, though separate as between themselves, the aggregate of

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the common interest fixes the jurisdiction. *Ibid.*; *Clay v. Field*, 138 U. S. 479, 34 L. ed. 1049, 11 Sup. Ct. Rep. 419.

### *Dissolution of Partnerships or Corporations.*

In the dissolution of a partnership or corporation, it is the value of the estate to be distributed that fixes the jurisdiction (*Kent v. Honsinger*, 167 Fed. 620; *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 449; *Jones v. Mutual Fidelity Co.* 123 Fed. 506; *Towle v. American Bldg. Loan & Invest. Soc.* 60 Fed. 131), and not individual claims of creditors joining in bill (*Ibid.*), provided the claims of all exceed two thousand dollars. It rests upon the fact that while each creditor has a distinct claim, yet they have a common interest in the insolvent estate to be administered in the court, in order to ascertain the amount each shall receive; in a word, they have a joint interest in a controversy involving a fund within the jurisdiction. *Davies v. Corbin*, 112 U. S. 36, 28 L. ed. 627, 5 Sup. Ct. Rep. 4; *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Putnam v. Timothy Dry Goods & Carpet Co.* 79 Fed. 454; *Jones v. Mutual Fidelity Co.* 123 Fed. 514; *Martin v. Rainwater*, 5 C. C. A. 398, 12 U. S. App. 232, 56 Fed. 10; *Handley v. Stutz*, 137 U. S. 366, 34 L. ed. 706, 11 Sup. Ct. Rep. 117; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96.

### *Partition Suits.*

It is ordinarily true that parties having distinct interests in property cannot join or aggregate the interests to obtain jurisdictional amounts, yet the representatives of a deceased person bringing suit against an administrator under the same title, and for a common or undivided interest, may obtain jurisdiction on the value of the whole property, and not the value of the interests of each (*Shields v. Thomas*, 17 How. 3, 15 L. ed. 93; *Prince v. Towns*, 33 Fed. 162), but when two or more heirs sue for their respective interests, and unite to avoid a multiplicity of suits, then the interest of each must exceed two thousand dollars. *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 276; *Walter v. Northeastern R. Co.* 147 U. S. 373, 37

L. ed. 208, 13 Sup. Ct. Rep. 348; Southern Land & Timber Co. v. Johnson, 156 Fed. 246; Parker v. Morrill, 106 U. S. 2, 27 L. ed. 72, 1 Sup. Ct. Rep. 14.

So where suit is brought to enforce the liability of heirs for debts of a decedent, the distributive share of each heir must exceed two thousand dollars to be suable in the Federal courts. Busey v. Smith, 67 Fed. 14. See McDaniel v. Traylor, 123 Fed. 339; Jones v. Mutual Fidelity Co. 123 Fed. 510, 511.

### *Suits for an Office.*

When the matter in dispute is the deprivation of an office, the salary fixes the amount. Simon v. House, *supra*, citing Smith v. Adams, 130 U. S. 175, 32 L. ed. 898, 9 Sup. Ct. Rep. 566, and Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

### *Amounts in Cases Sounding in Damages.*

While this branch of the subject is not exactly within equitable cognizance, yet it is useful in discussing Federal jurisdiction based on amount. The general rule is that in suits sounding in damages the damages claimed gives the jurisdiction (Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; Smith v. Greenhow, 109 U. S. 671, 27 L. ed. 1081, 3 Sup. Ct. Rep. 421; Von Schroeder v. Brittan, 93 Fed. 9; Bank of Arapahoe v. David Bradley & Co. 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 871; Kunkel v. Brown, 39 C. C. A. 665, 99 Fed. 594, 595); for the law gives no rule and the demand must furnish it, but, as in other cases, there must be manifest good faith (Bank of Arapahoe v. David Bradley & Co. 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 872; Von Schroeder v. Brittan, 93 Fed. 10); and the fact that the amount stated is not recovered is not a test, unless the evidence shows that the amount stated was clearly to get jurisdiction (Bank of Arapahoe v. David Bradley & Co. *supra*; Simon v. House, 46 Fed. 320), as, where the damages are so trivial as to rebut good faith. Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 290, is an illustrative case. See Smith-

ers v. Smith, 204 U. S. 642, 51 L. ed. 660, 27 Sup. Ct. Rep. 297, and Clement v. Louisville R. Co. 153 Fed. 979.

Of course, where damages are set up in tort or wilful trespass or personal injuries, it is difficult for a court to decide what a jury may do in giving actual or exemplary damage, and they are therefore not inclined to question the good faith of the claim, or to decide it only colorable. Where the law gives no rule, the demand of plaintiff must furnish one. Barry v. Edmunds, 116 U. S. 561, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; Simon v. House, 46 Fed. 321; Hynes v. Briggs, 41 Fed. 468; Herbert v. Rainey, 54 Fed. 251; Eisele v. Oddie, 128 Fed. 942.

Exemplary damages claimed in loss of property rights through fraud will not ordinarily be considered; it is only in cases of wilful injury to person or property, or in slander, libel, seduction, false imprisonment, etc. Bank of Arapahoe v. David Bradley & Co. 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 870; Day v. Woodworth, 13 How. 363, 14 L. ed. 181; Barry v. Edmunds, 116 U. S. 562, 29 L. ed. 733, 6 Sup. Ct. Rep. 501.

Again, in action for detention of property, damages to be a part of amount fixing jurisdiction must arise from the detention, and not consequential, as injury to business (Vance v. W. A. Vandercook Co. 170 U. S. 480, 481, 42 L. ed. 1115, 1116, 18 Sup. Ct. Rep. 645), or loss of trade and credit (Ibid.; Watson v. Sutherland, 5 Wall. 74, 18 L. ed. 580).

### *How Amount Alleged in Bill.*

The facts upon which jurisdiction rests must always be clearly alleged in the bill, that is, affirmatively appear because of the limited jurisdiction of the court. Hagge v. Kansas City S. R. Co. 104 Fed. 393; Dupree v. Leggette, 140 Fed. 776, S. C. 124 Fed. 700; Hanford v. Davies, 163 U. S. 279, 41 L. ed. 159, 16 Sup. Ct. Rep. 1051; Simon v. House, 46 Fed. 318; Grace v. American Cent. Ins. Co. 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; Halsted v. Buster, 119 U. S. 341, 30 L. ed. 462, 7 Sup. Ct. Rep. 276; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462,

4 Sup. Ct. Rep. 510; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873. And the presumption is that the cause is without jurisdiction unless it affirmatively appears in the bill. *Ibid.*; *United States v. Southern P. R. Co.* 49 Fed. 297. *Grace v. American Cent. Ins. Co.* supra; *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Adams v. Republic County*, 23 Fed. 212; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 337, 40 L. ed. 448, 16 Sup. Ct. Rep. 307.

With this formula, then, before us in statutory jurisdictional facts, the matter of amount must be shown by allegation to exceed two thousand dollars, exclusive of interest and costs. *Harvey v. Raleigh & G. R. Co.* 89 Fed. 115; *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* 89 Fed. 113. However, in *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806, it is said, that it is not essentially necessary that the amount in controversy should be stated if it appears from the bill, or in any part of the record citing many cases.

### *Affidavits to Show Amount.*

However, if the amount is defectively stated, or in some cases when not stated, as in suits for land when value has been omitted, affidavits have been allowed to show the value to sustain jurisdiction (*Carr v. Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *Robinson v. Suburban Brick Co.* supra; *Red River Cattle Co. v. Needham*, 137 U. S. 633, 34 L. ed. 800, 11 Sup. Ct. Rep. 208; *Richmond v. Milwaukee*, 21 How. 391, 16 L. ed. 72), and consequently you may amend the bill in this particular (*Home Ins. Co. v. Nobles*, 63 Fed. 641; *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 305; *Johnston v. Trippe*, 33 Fed. 530; *Re Plymouth Cordage Co.* 68 C. C. A. 434, 135 Fed. 1000-1003; *Thompson v. Automatic Fire Protection Co.* 151 Fed. 945, and cases cited. See *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754, 755); so if amount sufficient, but there was a failure to plead it (*Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 307).

## CHAPTER XXXV.

### HOW ISSUE IS RAISED.

Under the act of 1789 the issue of jurisdiction could only be raised by plea in abatement and proof, where the jurisdiction was properly averred. The court was powerless to dismiss the cause, and could only punish by costs when it was determined in the trial that the jurisdiction had been imposed upon.

By the act of 1875, section 5, Congress provided that in any suit commenced in or removed to the circuit courts of the United States, if it shall appear to the satisfaction of the court that such suit does not *really* and *substantially* involve a *dispute* or *controversy* properly in the jurisdiction of the court, etc., the court shall proceed no further. (See chapter 92). *Simon v. House*, 46 Fed. 319; *Anderson v. Watt*, 138 U. S. 694-701, 34 L. ed. 1078-1081, 11 Sup. Ct. Rep. 449; *Oregon R. & Nav. Co. v. Shell*, 143 Fed. 1006; *Williams v. Notowa*, 104 U. S. 212, 26 L. ed. 720; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 315-326, 32 L. ed. 690-694, 9 Sup. Ct. Rep. 289; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 542; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807. The act, as is seen, is mandatory and it should be construed according to its spirit and intent, and it becomes the manifest duty of the Federal courts to protect their jurisdiction from imposition at any stage of the proceeding and whenever made apparent. *Ibid.*; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *Horst v. Merkley*, 59 Fed. 503; *Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 52.

The courts, in construing this statute and applying it, exercise a legal, not a personal, discretion. Mere receiving an im-

pression that a substantial controversy within the jurisdiction of the court is not involved is not sufficient. It must be a legal certainty, and not a personal conviction, created by facts which justify the conclusion. It will be seen that the statute does not prescribe any mode by which it should be made to appear that the jurisdiction has been imposed upon, or how the objection should be interposed. *Wetmore v. Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Morris v. Gilmer*, 129 U. S. 326, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Simon v. House*, *supra*. No doubt the court may from any source be advised or led to suspect imposition, and it may cause the necessary inquiry to be made, and have the issue raised in such form as it may direct (*Ibid.*), and tried as an independent issue (*Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; *Wetmore v. Rymer*, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Terry v. Davy*, *supra*; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 291, 7 A. & E. Ann. Cas. 219; *Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 245, 246); but the evidence must create a legal certainty (*Wetmore v. Rymer*, *supra*); and if the court acts *sua sponte* the plaintiff is entitled to a hearing. (*Hartog v. Memory*, *supra*). But usually the issue is raised as follows:

First. By demurrer, if apparent, or in such case, the court may dismiss *sua sponte*.

Second. By plea, answer, or affidavit. *Morris v. Gilmer*, *supra*; *Simon v. House*, 46 Fed. 319, 320; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

Third. By motion or suggestion, or the court may, of his own accord, act if it appears by evidence pertinent to the issue. *Ibid.*; *Wetmore v. Rymer*, *supra*.

The trial court is not bound by the pleadings of the parties, and even though the amount may be alleged, yet if from the allegations of the bill it may be determined as a *matter of law* the amount could not be recovered, the court would dismiss. *Holden v. Utah & M. Machinery Co.* 82 Fed. 209. Such was the character of the case just cited, and it was so held on the principle suggested in *Simon v. House*, 46 Fed. 321, and other cases, that the subject-matter may be so far below the allegations of amount as to raise the inference that the statement as made showed knowledge or inexcusable ignorance. Ten-

nent Stribling Shoe Co. v. Roper, 36 C. C. A. 455, 94 Fed. 742; American Wringer Co. v. Ionia, 76 Fed. 7; Vance v. W. A. Vandercook Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; Levinski v. Middlesex Bkg. Co. 34 C. C. A. 452, 92 Fed. 463; Kunkel v. Brown, 39 C. C. A. 665, 99 Fed. 595.

### *By Plea or Answer.*

If, however, the jurisdiction is properly alleged, and it is not apparent that the court has been imposed upon, then you must raise the issue by plea or answer. If raised by plea, and the allegations of the amount are shown not to have been raised in good faith, the bill will be dismissed unless an amendment can be fairly made to bring the case within the jurisdiction. Jones v. Rowley, 73 Fed. 286; Bank of Arapahoe v. David Bradley & Co. supra; Less v. English, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477; Oregon R. & Nav. Co. v. Shell, 143 Fed. 1005; Ung Lung Chung v. Holmes, 98 Fed. 323; Butters v. Carney, 127 Fed. 623, see Ashley v. Presque Isle County, 27 C. C. A. 585, 54 U. S. App. 450, 83 Fed. 534. But when made in good faith the fact that plaintiff may not be able to recover all he sues for will not affect jurisdiction. Ibid.

It is said you can raise the issue of jurisdiction by plea or answer when the absence of jurisdiction is not apparent on the bill. Where you are certain of your proof, and that the plea will be sustained, and that there is no reasonable ground for amendment, then the plea should be interposed, as it presents a single issue to which your evidence can be confined; but if there is a reasonable ground for amendment so as to bring the case within the jurisdiction of the court, then it is best to raise the issue by answer; because if you sustain your plea, and the amendment is made, by which the court retains jurisdiction, you have lost the time in bringing the plea to issue, taking the evidence and trial, which could have been used in bringing the whole case to issue and trial, including the issue of jurisdiction. Equity rule 35.

Second. Because if your plea is overruled you are left to the mercy of the court.



(a) Upon the question of costs incurred in bringing the plea to issue and trial. Equity rule 34.

(b) If you are permitted to answer over, the court may arbitrarily fix the time for answer.

(c) You are debarred from setting up in your answer the matter set up in the plea.

(d) In making your issues by answer you can take the evidence on all the issues in your case, including the issue of jurisdiction, at the same time, and after you strengthen the plea to the jurisdiction by the general evidence taken in the case in support of the answer.

But the nature and effect of pleas will be discussed hereafter, and therefore so I pass on to the forms of demurrer and plea that are to be used when necessary.

### *Demurrer.*

A. B.	} In Equity	In Circuit Court of the United States
vs.		for the.....District of
C. D.		.....sitting at .....

Title as in bill.

The demurrer of C., defendant (or the joint and several demurrer of C. D. and E. F., defendants).

This defendant, not confessing any of the matters in the bill of complaint to be true, demur to said bill, for that, it appears on the face of said bill that this case does not really and substantially involve a dispute or controversy properly within the jurisdiction of the court, in that the amount (or value of the subject-matter) in dispute, as appears from the bill, does not exceed the sum of two thousand dollars, exclusive of interest and costs; wherefore the judgment of the court is prayed whether he shall be compelled to further answer said bill, and prays to be dismissed with costs.

R. F.,  
Solicitor.

Certificate of counsel and affidavit of defendant.

If the issue is by plea, then use the following form: Title as in bill. Beginning as in demurrer (*mutatis mutandis*).

For plea to said bill of complaint, aver and say, that the court should not take jurisdiction of this suit for that the said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in that the amount sued for (or the value of the subject matter), as alleged in the complaint, is not truly stated, or alleged in good faith, and this defendant says that the amount (or value of the

subject matter), really and substantially involved in the suit does not exceed the sum of two thousand dollars, exclusive of interest and costs; all of which he avers to be true and pleads the same in bar of the complaint in said bill, and prays the judgment of the court whether he should answer further, and prays to be dismissed hence with his costs.

R. F.,  
Solicitor.

**Certificate of counsel and affidavit of defendant.**

When the issue is set up in the answer you may use the same form of words as in the plea.

While these forms are ordinarily sufficient, yet the language to be used must, in view of the allegations of the bill and the nature of the controversy, be such as to substantially raise the issue. *Simon v. House*, 46 Fed. 318.

If neither plea nor answer raises the issue of jurisdiction, but it should appear in the trial of the cause that the amount actually involved (or value of the subject-matter in issue), is not in excess of two thousand dollars, exclusive of interest and costs, but in fact the jurisdiction has been imposed upon, and from the evidence it seems that the allegations were not made in good faith, then you may by suggestion, or a simple motion in writing, ask the court to dismiss the case; but, as before said, the disclosure must arise out of legitimate evidence on the material issues of the case, and in the absence of a plea or answer raising the issue, the court will not hear direct evidence upon the question of amount. *Wetmore v. Rymer*, 169 U. S. 122, 42 L. ed. 684, 18 Sup. Ct. Rep. 293.

## CHAPTER XXXVI.

### HOW THE ISSUE IS TRIED.

When the issue is raised by demurrer, the plaintiff must set down the demurrer for hearing, as will be hereafter explained under demurrer. If the issue is raised by plea, and plaintiff file a replication, and thereby joins issue with you, then evidence must be taken by deposition on the merits of the plea, or it may be taken by parol, if the court so directs, at the hearing. As soon as the time for hearing evidence has expired, the plaintiff must set it down for hearing as early as possible. (See "Demurrer" and "Plea, Hearing on.") *Alkire Grocery Co. v. Richesin*, 91 Fed. 79-82.

If the issue is a part of your answer to the bill, the evidence is taken in connection with the evidence on the merits of the whole bill, and is heard upon the final hearing, or may be submitted in advance of the hearing on the whole case, which is the better practice, and to that end you may set down the issue and evidence taken thereon for hearing, without reference to the merits of the case, using all the depositions taken in the case which may tend to throw light on the issue. *Butters v. Carney*, 127 Fed. 623.

If the issue has not been raised by plea or answer, but the depositions taken show a want of jurisdiction, as said, you may call the attention of the court to the fact by motion or other suggestion, and use the depositions taken to show it, or if you do not raise the question the court may order the issue made and tried, and it is its duty to do so if the evidence taken shows imposition on the jurisdiction. *Morris v. Gilmer*, 129 U. S. 315-326, 32 L. ed. 690-694, 9 Sup. Ct. Rep. 289; *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. In whatever way the issue is raised it should be tried at once, as an independent issue in advance of the merits. *Playford v. Lockard*, 65 Fed. 870; *Terry v. Davy*, 46 C. C. A.

141, 107 Fed. 52, and cases cited; *Ashley v. Presque Isle County*, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55-68; *Kirven v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 291, 292, 7 A. & E. Ann. Cas. 219.

### *By Affidavits.*

The practice of permitting affidavits to be filed in the Supreme Court to show jurisdiction arose from instances of accidental omission of allegation in the pleadings, and no issue of value raised in the court below. If there was a real controversy as to value, it must be settled in the first instance and upon notice and trial. *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Red River Cattle Co. v. Needham*, 137 U. S. 635, 34 L. ed. 800, 11 Sup. Ct. Rep. 208; *Carr v. Fife*, 156 U. S. 494, 39 L. ed. 508, 15 Sup. Ct. Rep. 427; *Rector v. Lipscomb*, 141 U. S. 558, 559, 35 L. ed. 857, 858, 12 Sup. Ct. Rep. 83. See *Talkington v. Dumbleton*, 123 U. S. 745, 746, 31 L. ed. 313, 314, 8 Sup. Ct. Rep. 335; *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806; *Greene County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 803, and cases cited; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540. In *Wilson v. Blair*, 119 U. S. 387, 30 L. ed. 441, 7 Sup. Ct. Rep. 230, it was declared to be good practice for the circuit court to allow affidavits and counter-affidavits in determining amount for appeal. *Davie v. Heyward*, 33 Fed. 95; *Morris v. Gilmer*, 129 U. S. 326, 32 L. ed. 694, 9 Sup. Ct. Rep. 289.

In *Talkington v. Dumbleton*, 123 U. S. 745, 31 L. ed. 313, 8 Sup. Ct. Rep. 335, the court states the result of all the cases, as to permitting affidavits to show the jurisdiction of the Supreme Court, as follows:

First. When demand not for money, and the value of the thing demanded is required to be stated, you cannot vary by affidavits the statement as made. *Green County Bank v. J. H. Teasdale Commission Co.* 112 Fed. 803.

Second. Nor when evidence is offered below on the question of value.

Third. But when an appeal is taken without any question

of value, and it is nowhere disclosed in the record, affidavits will be heard. (Authorities above.)

*Burden of Proof.*

The burden is on the defendant, when raised by plea or answer. *Butters v. Carney*, 127 Fed. 622; *contra*, *Oregon R. & Nav. Co. v. Shell*, 143 Fed. 1005.

## CHAPTER XXXVII.

### AMENDING TO SHOW JURISDICTION.

Having now discussed the fundamental grounds of Federal jurisdiction, and when, where, and how it must be shown, as well as how the issue, if any, is to be made and tried, I will now briefly speak of the right of amendment of jurisdictional allegations. We have just said one may amend his bill to show jurisdiction as to amount, where the facts warrant the exercise of jurisdiction. *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754, 755; *Whalen v. Gordon*, 37 C. C. A. 70, 95 Fed. 307; *Carnegie, P. & Co. v. Hulbert*, 16 C. C. A. 498, 36 U. S. App. 81, 70 Fed. 218; *Weller v. Hanaur*, 105 Fed. 194; *Davis v. Kansas City, S. & M. R. Co.* 32 Fed. 863; *Re Plymouth Cordage Co.* 68 C. C. A. 434, 135 Fed. 1003. And when an amendment is necessary, the jurisdiction is established from the beginning of the suit, and not date of amendment. *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 754; *Betzoldt v. American Ins. Co.* 47 Fed. 707. And this rule applies to any jurisdictional allegation that can be amended, as, where an allegation that a plaintiff is a citizen of a State, when in fact he was an alien, upon which *status* the jurisdiction depended; plaintiff may amend his pleading and allege he was an alien when the action was brought. *Grove v. Grove*, 93 Fed. 865; *Woodridge v. McKenna*, 8 Fed. 679; *Glover v. Shepperd*, 11 Biss. 572, 15 Fed. 838; *Thompson v. Automatic Fire Protection Co.* 151 Fed. 945. Or where there is a failure to give the residence of the parties, it may be amended on motion without delay. *Harvey v. Richmond & M. R. Co.* 64 Fed. 20; *Riggs v. Brown*, 172 Fed. 637.

So you may strike out by amendment the name of a party not indispensable, if the presence of such party affects the jurisdiction,—as, when it is necessary to create diversity of

citizenship. *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 89; *Grove v. Grove*, 93 Fed. 867; Equity Rule 47. Amendments will not be allowed after trial to confer jurisdiction which did not, in fact, exist at the time suit was begun. Thus, a plaintiff whose citizenship deprived the court of jurisdiction cannot assign his interest after trial to a coplaintiff of proper citizenship, and hold jurisdiction by setting up that fact by amendment. *Weller v. Hanaur*, 105 Fed. 193.

So an amendment of this character cannot be made on appeal, but the appellate court will reverse where the record is defective in its jurisdictional allegations, and remand the cause for amendment in this respect. *Preferred Acci. Ins. Co. v. Barker*, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814; *Van Doren v. Pennsylvania Co.* 35 C. C. A. 282, 93 Fed. 272, and cases cited; *Grove v. Grove*, supra; *Metcalf v. Watertown*, 128 U. S. 590, 32 L. ed. 544, 9 Sup. Ct. Rep. 173.

Where, as under equity rule 94, the jurisdictional facts are required to be alleged and sworn to, a failure to allege them as required cannot be amended. *Dickinson v. Consolidated Traction Co.* 114 Fed. 242, 243.

## CHAPTER XXXVIII.

### JURISDICTION BY ASSIGNMENT.

Section 11 of the judiciary act of 1789 provided as follows: "Nor shall any circuit or district court have cognizance of any suits to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court if no assignment had been made. *Except* in cases of foreign bills of exchange." This restriction over assigned claims was intended to prevent the creation of jurisdiction by simply assigning choses in action to a citizen of another State. *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Davis v. Mills*, 99 Fed. 40, and cases cited; *Tierney v. Helvetia Swiss F. Ins. Co.* 163 Fed. 82; *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 113, 75 C. C. A. 1, 145 Fed. 506; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 206-208, 39 L. ed. 674, 675, 15 Sup. Ct. Rep. 563; *Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561; *Stimson v. United Wrapping Mach. Co.* 156 Fed. 298, 299; *Bolles v. Lehigh Valley R. Co.* 127 Fed. 884; *Ferguson v. Consolidated Rubber Tire Co.* 169 Fed. 888, and cases cited; *Dulles v. H. D. Crippen Mfg. Co.* 156 Fed. 708; *Gorman-Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 365, cases cited; *State Nat. Bank v. Eureka Springs Water Co.* 174 Fed. 828. However where the court has jurisdiction of one claim it may determine the whole matter though other claims sued on were assigned to the plaintiff by persons that could not sue. *Howe & D. Co. v. Hangan*, 140 Fed. 183.

The act of 1875 provided: "No circuit or district court shall have cognizance of any suit founded on contract in favor of an assignee, unless suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant, and bills of exchange." *Ibid.*; *Tredway v. Sanger*, 107 U. S. 324,



27 L. ed. 582, 2 Sup. Ct. Rep. 691; *Emsheimer v. New Orleans*, 186 U. S. 43, 46 L. ed. 1046, 22 Sup. Ct. Rep. 770, S. C. 56 C. C. A. 189, 119 Fed. 1019; *Glass v. Concordia Parish*, 176 U. S. 209, 44 L. ed. 437, 20 Sup. Ct. Rep. 346.

By the act of 1888, now in force, the language was somewhat changed as follows: "Nor shall any district or circuit court of the United States have cognizance of any suits, except on foreign bills of exchange, to recover the contents of any promissory notes, or other choses in action in favor of any assignee, or of any subsequent holder, if such instrument be *payable to bearer*, and be *not made by any corporation*, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." U. S. Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 508; New Code, § 24.

The act means that a circuit court of the United States shall not have jurisdiction over a suit by an assignee of a promissory note, or other chose in action (except a foreign bill of exchange), unless the suit could have been maintained on the instrument in said court before the assignment; and that a subsequent holder of a promissory note, or other chose in action, "payable to bearer" (except a foreign bill of exchange, or an instrument made by a corporation), cannot sue in the circuit court of the United States unless the suit might have been brought upon such instrument in said court before the transfer was made to the subsequent holder.

Thus we see that Federal courts have not jurisdiction of a suit brought by the assignee of a promissory note, or chose in action, when the assignor could not have maintained it in said court, when the suit was brought. *Emsheimer v. New Orleans*, 186 U. S. 44, 46 L. ed. 1047, 22 Sup. Ct. Rep. 770; *Noyes v. Crawford*, 133 Fed. 796; *Jones v. Shapurn*, 57 Fed. 457; *New Orleans v. Benjamin*, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905, 71 Fed. 758; *Sullivan v. Ayer*, 174 Fed. 199; *Skinner v. Barr*, 77 Fed. 816. When the original beneficial owner could sue in the Federal courts, then the assignee can sue though the nominal payee could not, by reason of his citizenship. *Kirvin v. Virginia-Carolina Chemical Co.* 76 C. C. A. 172, 145 Fed. 290, 7 A. & E. Ann. Cas. 219, and cases cited. It is not necessary that the assignor should have been a resident of the assignee's district in which the suit is  
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brought. *Stinson v. United Wrapping Mach. Co.* 156 Fed. 298. See *Dulles v. H. D. Crippen Mfg. Co.* 156 Fed. 706, and *Ferguson v. Consolidated Rubber Tire Co.* supra.

The clause, "if such instrument be payable to bearer, and be not made by a corporation," operates as an exception to the general rule, and gives jurisdiction to assignees, when the instrument is made by a corporation, and payable to bearer, that is, negotiable by mere delivery.

So an assignee of a foreign bill of exchange, or promissory notes "payable to bearer," executed by corporations, may sue in the Federal courts unrestricted by this section of the judiciary act. *Newgass v. New Orleans*, 33 Fed. 196; *Rollins v. Chaffee County*, 34 Fed. 91; *Wilson v. Knox County*, 43 Fed. 481; *Steel v. Rathbun*, 42 Fed. 390; *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694.

With these exceptions, all choses in action which required an assignment to give a right of action, and promissory notes payable to bearer and passing by delivery, are within the act. *Ibid.*

### *Effect of Reassignment.*

If original assignor could sue, the fact the note has been re-assigned by one who could not, by reason of his citizenship, sue in the Federal court, would not affect right of the original assignor to sue in the Federal courts. *Moore Bros. Glass Co. v. Drevet Mfg. Co.* 154 Fed. 737. Objection to the jurisdiction, that it does not appear that the assignor could sue in the Federal courts can be raised at any time. *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 117.

### *What Are Choses in Action Within the Statute?*

In determining what is included in the words "choses in action," as used by the statute, it was early stated that the words comprehended all causes of action that could be equitably or legally assigned. *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201-206, 39 L. ed. 672-674, 15 Sup. Ct. Rep. 563; and *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 119-123,

review the cases construing the several acts of 1789, 1875, and 1888. *Gorman-Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 364; *Brown v. Beacon*, 174 Fed. 814, 815; *Jackson & S. Co. v. Pearson*, 60 Fed. 117.

It will be seen by these cases that the words include all character of contracts, covenants, and promises which confer the right to recover a personal chattel, or sum of money, except when transferred by operation of law. Assignments by operation of law creating legal representatives are not within the statute. *Ibid.*

In *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201-209, 39 L. ed. 672, 15 Sup. Ct. Rep. 563, the court holds that the words, "if the instrument be payable to bearer, and be not made by a corporation," did not limit the comprehensiveness of the words "choses in action," as construed above. *Ibid.*; *Sheldon v. Sill*, 8 How. 449, 12 L. ed. 1151; *Ban v. Columbia Southern R. Co.* 54 C. C. A. 407, 117 Fed. 21; *Coler v. Grainger County*, 20 C. C. A. 267, 43 U. S. App. 252, 74 Fed. 2122; *Corbin v. Black Hawk County*, 105 U. S. 664, 665, 26 L. ed. 1138; *Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co.* 152 U. S. 77, 38 L. ed. 360, 14 Sup. Ct. Rep. 483; *Shoecraft v. Bloxham*, 124 U. S. 735, 31 L. ed. 576, 8 Sup. Ct. Rep. 686; *Ambler v. Eppinger*, 137 U. S. 482, 34 L. ed. 766, 11 Sup. Ct. Rep. 173; *Bertha Zinc & Mineral Co. v. Vaughan*, 88 Fed. 569, 570.

"Choses in action" do not include rights of action founded on a wrongful act or neglect of duty causing damages, but are limited to suits founded upon contracts containing within themselves some promise or duty to be performed. *Ambler v. Eppinger*, 137 U. S. 480, 34 L. ed. 765, 11 Sup. Ct. Rep. 173; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. 178; *Muller v. Chicago, I. & L. R. Co.* 149 Fed. 940.

### *Illustrations.*

A parol contract falls within the words "choses in action." *Utah-Nevada Co. v. De Lamar*, 66 C. C. A. 179, 133 Fed. 120. So does an assignment of a lease. *Brooks v. Laurent*,

39 C. C. A. 201, 98 Fed. 651; See *Adams v. Shirk*, 44 C. C. A. 653, 105 Fed. 659-663. So does a judgment. *Walker v. Powers*, 104 U. S. 248, 26 L. ed. 730; *Mississippi Mills v. Cohn*, 150 U. S. 208, 37 L. ed. 1054, 14 Sup. Ct. Rep. 75; *Metcalf v. Watertown*, 128 U. S. 588, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. See *Hulthberg v. Anderson*, 170 Fed. 657, for exception. So does a contract for specific performance. *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. ed. 136; *Shoecraft v. Bloxham*, 124 U. S. 735, 31 L. ed. 576, 8 Sup. Ct. Rep. 686. And a contract to convey land. *Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co.* 152 U. S. 76, 38 L. ed. 360, 14 Sup. Ct. Rep. 483. It includes non-negotiable instruments also. *Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561. So in a suit to foreclose a mortgage. *Hoadley v. Day*, 128 Fed. 302; *Kolze v. Hoadley*, 200 U. S. 76, 50 L. ed. 377, 26 Sup. Ct. Rep. 220; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376. But not to a purchaser under foreclosure seeking to remove cloud. *Hobe-Peters Land Co. v. Farr*, 170 Fed. 644.

A claim for overcharge in freight was held not to come within the statute. *Conn v. Chicago, B. & Q. R. Co.* 48 Fed. 177; *Edmunds v. Illinois R. Co.* 80 Fed. 78. So, a nonresident assignee of a share in an estate, who sues the administrator on his bond, is not an assignee of a chose in action. *Bertha Zinc & Mineral Co. v. Vaughan*, 88 Fed. 566. So, a suit by an assignee to force a transfer of stock is not within the statute. *Jewett v. Bradford Sav. Bank & T. Co.* 45 Fed. 802. A purchaser under a decree of foreclosure is not an assignee within the statute. *Portage City Water Co. v. Portage*, 102 Fed. 769; *Hobe-Peter Land Co. v. Farr*, *supra*.

Having seen what character of obligations are included in the words "choses in action," I will now illustrate by cases the jurisdiction of the Federal court as limited by the first section of the act of 1888.

In *Newgass v. New Orleans*, 33 Fed. 196, the statute was construed shortly after its passage in 1887, and it was held that when the transfers of "choses in action" required an assignment, the court had no jurisdiction of a suit by the assignee, if the assignor could not sue in the Federal court; and where transfers were made by delivery, the obligation being paid to

bearer, such choses in action were also excluded unless made by a corporation, and the statute was construed as follows:

(a) When suits were on foreign bills of exchange.

(b) When suits were such that the original payee in the instrument could sue in the Federal courts.

(c) When suits were upon "choses in action" payable to bearer, executed by a corporation, then such suits could be brought in the Federal court; otherwise a Federal court had no jurisdiction of a suit brought by an assignee. The construction was followed in *Rollins v. Chaffee County*, 34 Fed. 91; *Wilson v. Knox County*, 43 Fed. 481, and approved by the Supreme Court in *New Orleans v. Quinlan*, 173 U. S. 191, 43 L. ed. 664, 19 Sup. Ct. Rep. 329, 92 Fed. 695; *Laird v. Indemnity Mut. M. Assur. Co.* 44 Fed. 712; *Bank of British N. A. v. Barling*, 46 Fed. 357; *Thompson v. Searcy County*, 6 C. C. A. 674, 12 U. S. App. 618, 57 Fed. 1036.

In *Holmes v. Goldsmith*, 147 U. S. 156, 37 L. ed. 120, 13 Sup. Ct. Rep. 288, a note was made by a citizen of Oregon and payable to a citizen of Oregon, it seems for accommodation. The payee discounted the note in New York, and the New York parties sued in the Federal courts of Oregon. Court held jurisdiction in the case, but placed it on the ground that the note being made for the accommodation of the indorser, he was in legal effect the maker, and had no cause of action against the maker, and was not an assignor of a cause of action within the meaning of the statute. But, as stated before, the section of the act was intended to prevent assignments by citizens of the same State with the debtor, so as to give jurisdiction to Federal courts. *New Orleans v. Benjamin*, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905; *Brigham-Hopkins Co. v. Gross*, 107 Fed. 770; *Chase v. Sheldon Roller-Mills Co.* 56 Fed. 625. See *South Dakota v. North Carolina*, 192 U. S. 287, 48 L. ed. 448, 24 Sup. Ct. Rep. 269, holding a citizen of one State can assign to his State bonds of another State, and suit may be brought by the assignee State in the Supreme Court of the United States, but this is a clear evasion of the 11th Amendment to the Constitution of the United States, as shown by the dissenting opinion of Mr. Justice White, pp. 329 *et seq.*

## CHAPTER XXXIX.

### PROMISSORY NOTES PAYABLE TO BEARER MADE BY CORPORATIONS.

The evident purpose of this provision of the act was to retain jurisdiction in the Federal courts of a large class of securities made by corporations which are sold in open market and pass by delivery. *Wilson v. Knox County*, *supra*.

Municipal bonds payable to ....., or order, and originally sold to a citizen of Iowa, from whom the plaintiff, a citizen of New Hampshire, purchased them, were held in legal effect payable to bearer (*Independent School Dist. v. Hall*, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 371; *Reynolds v. Lyon County*, 97 Fed. 155), and, being executed by a corporation, were within the jurisdiction of a Federal court. *Lyon County v. Keene Five Cent Sav. Bank*, 40 C. C. A. 391, 100 Fed. 337; *Citizens' Sav. Bank v. Newburyport*, 95 C. C. A. 232, 169 Fed. 766; *Lake County v. Dudley*, 173 U. S. 243-250, 43 L. ed. 684-687, 19 Sup. Ct. Rep. 398; *Gambée v. Rural Independent School Dist.* 132 Fed. 514. *Contra Thomson v. Elton*, 100 Fed. 145; *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694.

In *Quinlan v. New Orleans*, 92 Fed. 695, it is held that if the proper diversity of citizenship exists, the holder of a note payable to bearer, executed by a corporation, may sue in the Federal courts, but not so if not payable to bearer. *New Orleans v. Quinlan*, 173 U. S. 192, 43 L. ed. 664, 19 Sup. Ct. Rep. 329; *Cloud v. Sumas*, 52 Fed. 177; *Loeb v. Columbia Twp.* 179 U. S. 485, 486, 45 L. ed. 288, 289, 21 Sup. Ct. Rep. 174.

You see, a distinction is made between bonds and notes, executed by a corporation, payable to bearer, and *not* payable to bearer; only those *payable to bearer* can be sued upon by an assignee, whether the assignor could sue or not; that is, it is

not necessary to show diversity of citizenship between the original parties to the instrument in order for an assignee to maintain the suit in a Federal court. See *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 530, 531; *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 462.

In *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905, suit was brought upon warrants executed by a corporation, payable to the order of a certain person, and other warrants simply stating an indebtedness to certain persons, not being payable to bearer. The Supreme Court held the assignee must show the assignor could sue in a Federal court.

In *Thomson v. Elton*, 100 Fed. 145, it was held that the holder of a municipal bond payable to a person named, or order, and indorsed in blank, could only maintain an action in the Federal court when payee could do so, as the title comes through him. However, though bonds cannot be sued upon, you may sue on coupons payable to bearer. *Independent School Dist. v. Rew*, 55 L.R.A. 364, 49 C. C. A. 198, 111 Fed. 2; *Reynolds v. Lyon County*, *supra*. But in *Lyon County v. Keene Five-Cent Sav. Bank*, *supra*, the court held that a municipal bond payable to . . . . ., or order, is in legal effect payable to bearer and within the exception made by the statute, it having been executed by a corporation. *Keene Five-Cent Sav. Bank v. Lyon County*, 90 Fed. 523.

In *Loeb v. Columbia Twp.* 91 Fed. 37, townships issued bonds; held issued by a corporation, so that assignee may sue. *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 689.

In *Wilson v. Knox County*, 43 Fed. 481, held, county warrants not payable to bearer must show original payee could sue. See *Kearny County v. Irvine*, 61 C. C. A. 607, 126 Fed. 694. Citizens of another State brought suit on coupons payable to bearer purchased after detached. Held, their right to sue in the Federal court was not affected by the citizenship of the holder of the bonds, though payable to citizens of the county. *Reynolds v. Lyon County and Independent School Dist. v. Rew*, *supra*; *Edwards v. Bates County*, 163 U. S. 269, 41 L. ed. 155, 16 Sup. Ct. Rep. 967; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746. County warrants payable "to bearer" can be sued in the Federal courts by assignee if nonresident. *Kearny County v. McMaster*, 15

C. C. A. 353, 32 U. S. App. 367, 68 Fed. 177; Kearny County v. Irvine, 126 Fed. 694. Ibid. Coupons also are primary causes of action. Ibid.

Of course, a fictitious transfer of bonds or coupons to obtain jurisdiction would be a fraud on the court. Bernard Twp. v. Stebbins, 109 U. S. 355; Hartford F. Ins. Co. v. Erie R. Co. 172 Fed. 902, and cases cited; Kreider v. Cole, 79 C. C. A. 339, 149 Fed. 647; Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311. See Bernheim v. Birnbaum, 30 Fed. 885; Lake County v. Dudley, 173 U. S. 251, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 335, 40 L. ed. 447, 16 Sup. Ct. Rep. 307; Waite v. Santa Cruz, 184 U. S. 326, 46 L. ed. 567, 22 Sup. Ct. Rep. 327; Williams v. Nottawa, 104 U. S. 212, 213, 26 L. ed. 720, 721. But assignment without consideration, for purposes of suit, would not be collusive if the assignor could have brought suit. Hartford F. Ins. Co. v. Erie R. Co. 172 Fed. 899-902. See Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427, and cases cited.

The rule above applies to removals, as well as causes originally brought in the Federal courts. Mexican Nat. R. Co. v. Davidson, 157 U. S. 205, 39 L. ed. 674, 15 Sup. Ct. Rep. 563.

### *History of the Assignment Clause in Act of 1888.*

Having stated the rule of jurisdiction as affected by assignments of choses in action, I will give a brief history of this clause in the act of 1888, sec. 1, as it will enable you to better understand the construction given it, and in a measure account for conflicting decisions in the Federal courts.

Section 1 of the act of 1789 provided that the assignee of the instruments named could not recover the contents of any such instruments, unless the original payee could sue in the Federal courts; that is, unless there existed a diversity of citizenship between the maker and payee; but foreign bills of exchange were excepted. Between 1789 and 1875 there are numerous decisions construing the clause.

First. We find the words, "assignee of a promissory note or other causes of action," strictly construed, and instruments payable to bearer, or to a named person, excepted from the rule,



because the instrument was not technically assigned, but passed by simple delivery. *Thompson v. Perrine*, 106 U. S. 593, 27 L. ed. 300, 1 Sup. Ct. Rep. 564, 568; *Adams v. Republic County*, 23 Fed. 213; *New Orleans v. Quinlan*, *supra*; *Jerome v. Rio Grande County*, 5 McCrary, 639, 18 Fed. 874; *Chickaming v. Carpenter*, 106 U. S. 666, 27 L. ed. 308, 1 Sup. Ct. Rep. 620.

Second. We find an indorsee could sue his immediate indorser if diversity of citizenship existed between them, and without reference to the citizenship of the immediate parties to the instrument, because the claim was derived through a new contract, and not through an assignment. *Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 912, and cases cited.

Third. Many cases drew the distinction between the recovery of the "contents" of a note or other chose in action, and the recovery of the notes or instruments themselves (but this language is retained in the act of 1888, and will be noticed hereafter). *Deshler v. Dodge*, 16 How. 631, 14 L. ed. 1088; *New Orleans v. Benjamin*, 153 U. S. 433, 38 L. ed. 772, 14 Sup. Ct. Rep. 905; *Plant Invest. Co. v. Jacksonville, T. & K. W. R. Co.* 152 U. S. 76, 38 L. ed. 360, 14 Sup. Ct. Rep. 483; *Shoecraft v. Blaxham*, 124 U. S. 730, 31 L. ed. 574, 8 Sup. Ct. Rep. 686.

March 3, 1875, Congress, with a view of increasing the jurisdiction of the Federal courts, excepted from the rule notes negotiable by the law merchant, as well as bills of exchange, leaving out the word "foreign" before bills of exchange, in the act of 1789. Here all the bars to entering Federal courts were let down as to commercial paper, and exceptions evolved out of the act of 1789 in the various decisions became of no importance whatever. *Tredway v. Sanger*, 107 U. S. 323, 27 L. ed. 582, 2 Sup. Ct. Rep. 691; *New Orleans v. Quinlan*, *supra*; *Mersman v. Werges*, 112 U. S. 143, 28 L. ed. 643, 5 Sup. Ct. Rep. 65.

In 1888 Congress, with a view of restricting again the jurisdiction of the Federal courts, changed the whole clause so as to read, "Nor shall any circuit or district court have cognizance of any suits (except upon foreign bills of exchange) to recover the contents of any promissory note, or other chose in action,

in favor of any assignee or of *any subsequent holder*, if such instrument be *made payable 'to bearer'* and be *not made by any corporation*, unless the suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The italicized words show the difference between the acts of 1789 and 1888. It appears then—

(a) That the word "foreign" was restored, as in the act of 1789, before "bills of exchange." *Morgan v. Gay*, 19 Wall. 81, 22 L. ed. 100.

(b) That a note excluded by construction from the act of 1789 was now expressly included in the act of 1888, unless made by a corporation.

(c) That the word "transfer" was evidently intended to enlarge the scope given by the construction to the word "assignee," under the act of 1789, and was intended to cover every case in which title to negotiable paper, the contents of which might be the subject of suit, had vested by acts of parties or by operation of law.

(d) That the exception made under the act of 1789, by which an indorsee could sue his immediate indorser, if diversity of citizenship existed, was abrogated by the act of 1888.

There being no question about the proposition (a), I will now examine a few cases illustrating the propositions designated by (b), (c), and (d).

Proposition (b) has been fully illustrated in discussing "promissory notes payable to bearer made by corporations."

Proposition (c), relating to the intention of Congress in using the word "transfer" in the act of 1888. There is no question that the word so used was intended to enlarge the scope of the word "assignee," and to cover all methods, whether by acts of parties or operation of law, by which title to choses in action passed, and to annul the construction given to the word "assignment" under the act of 1789. *United States Nat. Bank v. McNair*, 56 Fed. 326, 327.

Under proposition (d), the construction given to the act of 1789, whereby an assignee could sue his immediate assignor if diversity of citizenship existed, was abrogated by the act of 1888. The language of the act of 1888 clearly shows the mind of Congress to place the right of suit by the *assignee*, or *subsequent holder*, upon the citizenship existing between the maker

and the payee of the instrument assigned; that is, the assignee of a chose in action under the present act, or any subsequent holder of the assigned instrument, cannot sue in the Federal courts unless such suit might have been maintained between the original parties to the instrument, or, as stated in the act, "as if no assignment or *transfer* had been made. *Portage City Water Co. v. Portage*, 102 Fed. 769; *Emsheimer v. New Orleans*, 116 Fed. 893; *Utah-Nevada Co. v. De Lamar*, 133 Fed. 119. But if suit could be maintained between original holders, then citizenship of intermediate assignees is not important.

In *Skinner v. Barr*, 77 Fed. 816, a note was executed by one Price to Knap, and indorsed by one Barr, all of Pennsylvania. One Skinner, of New Jersey, became the assignee, and sued Barr in the Federal court. Held, the original payee not being able to sue in the Federal court, Skinner could not sue there. *United States Nat. Bank v. McNair*, 56 Fed. 325.

In *Superior v. Ripley*, 138 U. S. 96, 97, 34 L. ed. 916, 11 Sup. Ct. Rep. 288, it was held that a draft drawn by a citizen of a State on a corporation of the same State, but in favor of a citizen of another State, does not come within the statute, for at the moment of acceptance the acceptor becomes the primary debtor, and it is a new contract between the acceptor and non-resident, and the latter may sue without tracing title through the drawer.

In note payable "to order" and transferred, assignee cannot sue in a Federal court unless the assignor could. *United States Nat. Bank v. McNair*, 56 Fed. 324; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912. See *Jones v. Shapera*, 6 C. C. A. 423, 13 U. S. App. 481, 57 Fed. 462. And the record must show that the suit could have been maintained in the name of the assignor when brought. *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *Dexter H. & Co. v. Sayward*, 84 Fed. 300; *United States Nat. Bank v. McNair*, 56 Fed. 327. So an assignee of a State judgment depends for jurisdiction on the citizenship of the assignor (*Mississippi Mills v. Cohn*, 150 U. S. 208, 37 L. ed. 1054, 14 Sup. Ct. Rep. 75), and so as to all non-negotiable instruments (*Smith v. Fifield*, 33 C. C. A. 681, 63 U. S. App. 531, 91 Fed. 561; *Holmes v. Goldsmith*, 147 U. S. 157, 37 L. ed. 120, 13 Sup. Ct. Rep. 288; *Wilson v. Knox*

County, 43 Fed. 482). So when assigned by partnership by one partner. *Ban v. Columbia Southern Co.* 54 C. C. A. 407, 117 Fed. 21, U. S. Rev. Stat. 629, reversing 109 Fed. 499. So a trustee as assignee of a contract between citizens of same State cannot sue. *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552, 48 C. C. A. 608, 109 Fed. 676; *American Waterworks & Guarantee Co. v. Home Water Co.* 115 Fed. 171.

### *How Assignments Alleged in Bill.*

If the citizenship of the original payee is material to the jurisdiction it is essential to show it in the bill. Act 1888, sec. 1; *Holmes v. Goldsmith*, supra; *Parker v. Ormsby*, 141 U. S. 85, 35 L. ed. 656, 11 Sup. Ct. Rep. 912; *Benjamin v. New Orleans*, 169 U. S. 163, 42 L. ed. 702, 18 Sup. Ct. Rep. 298; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 268, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869; *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *United States Nat. Bank v. McNair*, 56 Fed. 324; *Dexter, H. & Co. v. Sayward*, supra, and cases cited. And the citizenship must be distinctly alleged and not inferentially. Thus an allegation by an assignee, that each of said persons, etc., are now and were, on the ..... day of ....., citizens of States other than the State of ....., and competent to maintain suit, as if no such assignment had been made, is insufficient to confer jurisdiction; must state citizenship of each party. *Benjamin v. New Orleans*, 20 C. C. A. 591, 41 U. S. App. 178, 74 Fed. 417, 71 Fed. 758.

So in an action on claims aggregating the jurisdictional amount, which have been acquired by assignment, the bill must show the citizenship of the assignors; and the same rule applies in removals. *Murphy v. Payette Alluvial Gold Co.* supra; *Davis v. Mills*, 99 Fed. 39-41; *North American Transp. & Trading Co. v. Morrison*, 178 U. S. 269, 44 L. ed. 1064, 20 Sup. Ct. Rep. 869; *Fife v. Whittell*, 102 Fed. 539, 540.

You cannot amend after removal to show it. *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Graves v. Corbin*, 132 U. S. 590, 591, 33 L. ed. 468, 469, 10 Sup. Ct. Rep. 196.

*Subsequent Changes.*

Subsequent changes are not considered if jurisdiction existed when the suit was brought. *Emsheimer v. New Orleans*, 116 Fed. 893, 186 U. S. 44, 46 L. ed. 1047, 22 Sup. Ct. Rep. 770; *Jones v. Shapira*, 57 Fed. 457. Citizenship of subsequent holders not considered. *Ibid.*

*Assignment Must Be Genuine.*

The assignment must not be colorable, and when it is a suit at law, jury may pass upon it if evidence conflicting. Act 1888, sec. 5; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Lake County v. Schradsky*, 38 C. C. A. 17, 97 Fed. 1; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, 5 Sup. Ct. Rep. 807; *Lake County v. Dudley*, 173 U. S. 253, 43 L. ed. 688, 19 Sup. Ct. Rep. 398; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Crawford v. Neal*, 144 U. S. 593; *Waite v. Santa Cruz*, 184 U. S. 325; *Morris v. Gilmer*, 129 U. S. 327.

*How the Issue is Raised.*

When the assignor not entitled to sue, defendant may dismiss. *Ibid.*; *Farmington v. Pillsbury*, 114 U. S. 144; *Wetmore v. Rymer*, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; *Defiance Water Co. v. Defiance*, 191 U. S. 194, 48 L. ed. 144, 24 Sup. Ct. Rep. 63. And the issue is raised by demurrer if apparent in the bill, and by plea or answer if not apparent. If raised by demurrer you may use form given under the issue of diversity of citizenship, which see. If by plea, then use the following form:

Title and commencement as before given in pleas to jurisdiction, then proceed—

That it appears from said bill that the diversity of citizenship to sustain the jurisdiction of this court is sought through the assignment of the (cause of action) to complainant, and that so much of the allegation of said bill as avers that E. F., the payee and assignor, through whom complainant derives title, was a citizen of the State of.....is not true, for defendant avers that he was at the time of the execution and delivery of the (cause of action), and is now, a citizen of the State of.....

and not of the State of . . . . ., as alleged in the bill, and that no diversity of citizenship on which to base the jurisdiction of this court exists in this suit. All of which matters and things this defendant avers to be true, and pleads the same in bar of complainant's said bill.

Wherefore defendant prays the judgment of the court whether he shall answer further, and asks to be dismissed hence with his cost.

R. F.,  
Solicitor, etc.

Certificate of counsel; affidavit of defendant.

If the jurisdiction is based on the fact that it is alleged the instrument was executed by a corporation and payable to bearer, and you wish to raise the issue by plea or answer, use the same form *mutatis mutandis*. You must deny specifically that it was executed by a corporation, or that the chose in action is payable to bearer. If raised in answer you may use the same form of allegation.

## CHAPTER XL

### PARTIES.

I have now discussed so much of the general and territorial jurisdiction of the circuit courts of the United States as is necessary to be known in order to intelligently prepare a bill in a Federal equity suit. It is only a general treatment of the subject, but my purpose is to stimulate and direct your investigation along lines that will lead to correct conclusions, as to whether you have jurisdiction under the Constitution and laws of the United States, and, having determined that fact, then to correctly state it in your bill.

In what has been already said, it is seen that Federal jurisdiction depends largely upon who are to be parties to the bill, for the Federal statutes create limitations on Federal jurisdiction over parties. *Bland v. Fleeman*, 29 Fed. 672. I will therefore now discuss parties generally, and how they are affected by the limitation created by Federal laws, and the rules of equity.

It is a cardinal principle in courts of equity generally, that all persons interested in a suit, or to be affected by the results, should be made parties (*Ibid.*; *Minnesota v. Northern Securities Co.* 184 U. S. 199, 235, 46 L. ed. 499, 515, 22 Sup. Ct. Rep. 308; *Stevens v. Smith*, 61 C. C. A. 624, 126 Fed. 711; *Weidenfeld v. Northern P. R. Co.* 63 C. C. A. 537, 129 Fed. 311; *Arkansas, Southeastern R. Co. v. Union Sawmill Co.* 83 C. C. A. 224, 154 Fed. 304; *Golden v. Bruning*, 72 Fed. 4); either plaintiff or defendant (*Ibid.*) because it is the aim of courts of equity to do complete justice, and to settle the rights of all parties interested in the subject-matter in *one* suit, in order that litigation may end, and a multiplicity of suits be avoided (*Ibid.*; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 86; *Mackay v. Gabel*, 117 Fed. 878; *Oberlin College v. Blair*, 70 Fed. 419). This rule, however, is open to exceptions and relaxation and modification, which sometimes become neces-

sary to preserve the ends of justice. *Smith v. Lee*, 77 Fed. 782; *Perkins v. Hendryx*, 127 Fed. 449; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 159, 160; *Cleveland Tel. Co. v. Stone*, 105 Fed. 794; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 87; *McArthur v. Scott*, 113 U. S. 392, 28 L. ed. 1031, 5 Sup. Ct. Rep. 652; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160; *Kuchler v. Greene*, 163 Fed. 98. The necessity for relaxation and modification of the rule is more frequently apparent in Federal courts of equity, where the enforcement of the rule would often oust the jurisdiction of these courts. *Elmendorf v. Taylor*, 10 Wheat. 168, 6 L. ed. 294; *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600. In applying the rule to the Federal courts, it may be stated that if all the parties interested in the suit are within the jurisdiction of the court, then the rule applies, and all the parties materially interested in the subject-matter, or object of the suit, should be brought before the court as plaintiffs or defendants, so that the matter may be settled by one decree. *Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; *Consolidated Water Co. v. San Diego*, 35 C. C. A. 631, 93 Fed. 851, 852; *Bland v. Fleeman*, 29 Fed. 673; *Consolidated Water Co. v. Babcock*, 76 Fed. 243; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 450, 21 L. ed. 368; *Golden v. Bruning*, *supra*; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554.

In stating this general rule it must not be understood that all the parties must have an interest in all the matters involved in the suit, but each party must have an interest in some of the material matters connected with the others. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 412, 32 L. ed. 468, 470, 9 Sup. Ct. Rep. 127; *Golden v. Bruning*, *supra*; *Finegan v. Read*, 8 Tex. Civ. App. 36, 27 S. W. 261, and cases cited; *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 780; *Curran v. Campion*, 29 C. C. A. 26, 56 U. S. App. 383, 85 Fed. 67-70.

If the cause of suit is entire in itself, and the relief sought does not consist in separate, unconnected things, all the defendants connected therewith and to be affected thereby should be made parties. It is not necessary that the interest of each defendant should extend to the whole subject-matter in litigation. *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 329; *Bailey v. Til-*



linghast, 40 C. C. A. 93, 99 Fed. 801; *Dastervignes v. United States*, 58 C. C. A. 346, 122 Fed. 36; *Louisville & N. R. Co. v. Smith*, 63 C. C. A. 1, 128 Fed. 6, 7; *Wyman v. Bowman*, 62 C. C. A. 189, 127 Fed. 264.

It is not essential that there should be a community of interest between parties defendant, but when a common question of law arising under similar facts is involved between plaintiff and each defendant, equity has jurisdiction. Nor it is necessary that there should be a common interest in the claims and rights of action against the defendant, when they all arise from some common cause, and are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one suit brought by those uniting as plaintiffs. *Osborne v. Wisconsin C. R. Co.* 43 Fed. 824; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160; *Sang Lung v. Jackson*, 85 Fed. 502; *Pillsbury Washburn Flour Mills Co. v. Eagle*, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 629; *Scott v. Donald*, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct. Rep. 262. There will be an illustration of these rules affecting parties, hereafter, when I discuss "the rule of parties when numerous."

Thus far I have stated only the general rule of parties in equity. We have seen that the Federal courts were incapacitated to proceed against a person not a citizen of and residing in the State and district in which the suit is brought, nor could they proceed in the absence of a Federal question, unless all the parties on one side were citizens of a different State from all the parties on the other side. We have further seen, except in a certain class of cases, the Federal courts were unable to bring in a defendant living beyond the territorial jurisdiction of the court. These conditions, of course, must have seriously affected the general rule of equity as to parties, and confined these courts within very narrow limits, and even within these limits the question of parties became burdensome to litigants.

The Federal courts early sought to escape this incapacity imposed upon them, and began to apply the rule that where the real merits of the cause could be determined without essentially affecting the interests of absent persons, though they may be interested, they would dispense with their presence and proceed. *Russell v. Clark*, 7 Cranch, 98, 3 L. ed. 281; *Cameron v. M'Roberts*, 3 Wheat. 594, 4 L. ed. 467; *Vattier v. Hinde*, S. Eq.—15.

7 Pet. 262, 8 L. ed. 679; *Payne v. Hook*, 7 Wall. 425, 17 L. ed. 260; *Hagan v. Walker*, 14 How. 36, 14 L. ed. 315.

In 1839 Congress embodied these decisions in a statute (section 737, United States Revised Statutes, U. S. Comp. Stat. 1901, p. 587), which substantially provided that when there were several defendants in any suit at law or equity, and one or more of them were not inhabitants of, or found in the district of suit, and do not voluntarily appear, the court could entertain jurisdiction, and proceed with the parties who were properly before it, but the decree was not to affect the absent defendants, and, further, that the nonjoinder of parties who could not be reached by process should not be pleaded in abatement. Equity rule 47; *Mackay v. Gabel*, 117 Fed. 878; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554; *Gross v. George W. Scott Mfg. Co.* 48 Fed. 39, 40; *Barney v. Baltimore*, 6 Wall. 287, 18 L. ed. 827; *Clearwater v. Meredith*, 21 How. 489, 16 L. ed. 201.

This act related only to persons without the territorial jurisdiction of the court, and did not affect cases in which persons having an interest were in reach of the court's process, and whose joinder would not have defeated jurisdiction because of citizenship. *Ibid.*; *Barney v. Baltimore*, 6 Wall. 284, 18 L. ed. 826; *Conolly v. Wells*, 33 Fed. 204-214; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Williams v. Bankhead*, 19 Wall. 571, 22 L. ed. 184; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 126.

In 1842 the Supreme Court promulgated equity rule 47, embodying this act of Congress, and provided for cases where a joinder of parties would oust jurisdiction because of citizenship, and it was in substance as follows: In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties, by reason of their being out of the jurisdiction of the court, or otherwise incapable of being made parties, or because their joinder would oust the jurisdiction of the court, the court may at its discretion proceed with the case without making such persons parties; and it was provided that the decree should be without prejudice to the absent defendants.

Appendix; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; *Mackay v. Gabel* and *Hagan v. Walker*, *supra*.

About the same time equity rule 22 was promulgated by the Supreme Court, providing that if any persons other than those named in the bill as defendants shall appear to be necessary or proper parties, the bill must aver the reason why they are not made parties, by showing that they are out of the jurisdiction, or could not be made parties without ousting jurisdiction as to those before the court.

Again, in the same year, equity rule 48 was promulgated as follows: That where parties plaintiff and defendant were numerous, and could not, without manifest inconvenience and oppressive delays, be all brought in before the court, then the court may in its discretion dispense with making all parties, and may proceed with the suit, if there are sufficient parties to represent all adverse interests, but the decree was to be without prejudice to absent parties. This, however, was only an affirmance of an old equity rule. *Williams v. Bankhead*, 19 Wall. 563, 22 L. ed. 184; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 606.

The above act of Congress, and rules of court having the force and effect of an act of Congress (*Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Burton v. Smith*, 13 Pet. 472, 10 L. ed. 252), created well-defined exceptions to the general rule of parties, and I will here succinctly state the effect of these exceptions.

First. That persons not inhabitants of or found in the district in which suit is brought need not, though they be proper and necessary parties, be made parties unless they voluntarily appear.

Second. That where making parties, though they be necessary and proper, would oust the jurisdiction of the court by destroying diversity of citizenship upon which jurisdiction rests, you may omit them. *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* *supra*.

Third. When parties are numerous, so that bringing them all in would create delay, inconvenience, and extraordinary expense, you may bring in only so many as will fairly represent the adverse interest to be litigated. *Mandeville v. Riggs*, 2 Pet.

487, 7 L. ed. 494; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union* Nos. 1 & 3, *supra*. But see 90 Fed. 606, where parties may be numerous and representatives not found.

It will be further seen that neither the statutes nor rule 47 authorizes the court to take jurisdiction in the absence of an indispensable party. *California v. Southern P. Co.* 157 U. S. 250, 251, 39 L. ed. 691, 15 Sup. Ct. Rep. 591.

## CHAPTER XLI.

### THREE CLASSES OF PARTIES.

You will notice in the exceptions as stated, that both the classes of parties known to equity as "proper" and "necessary" may be omitted in the Federal courts. This brings us to the discussion of a third class of parties, which Federal courts of equity have been compelled to recognize, to wit, "indispensable parties." *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *California v. Southern P. Co.* 157 U. S. 249, 250, 39 L. ed. 690, 691, 15 Sup. Ct. Rep. 591; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 418; *Caylor v. Cooper*, 165 Fed. 758; *Mathieson v. Craven*, 164 Fed. 471; *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122; *Tug River Coal & Salt Co. v. Brigel*, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 821; *Mason v. Dullagham*, 27 C. C. A. 296, 53 U. S. App. 539, 82 Fed. 689; *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 657; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160.

In *Barney v. Baltimore*, *supra*, you will find clear definitions of the three classes of parties recognized by Federal courts of equity.

First. There is a class with such relation to the subject-matter that while they may be parties the court may dispense with them if so made, and the plaintiff may or may not make them parties, without making his bill objectionable in either event. These are proper or formal parties. *Lake Street Elev. R. Co. v. Ziegler*, *supra*; *Donovan v. Campion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 73, 19 Mor. Min. Rep. 247; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 563, 85 Fed. 56; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 126; *Brown v. Murray, N. & Co.* 43 Fed. 617; *Hyde v. Victoria Land Co.* 125 Fed. 973; *Wallin v. Reagan*, 171 Fed. 764; *White Swan Mines Co. v. Balliet*, 134 Fed. 1004; *Wood*

v. Davis, 18 How. 469, 15 L. ed. 461; Higgins v. Baltimore & O. R. Co. 99 Fed. 641. Thus, when the party is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, he is a proper party. Ibid.; Hicklin v. Marco, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553, 554; Wilson v. Oswego Twp. 151 U. S. 64, 38 L. ed. 74, 14 Sup. Ct. Rep. 259.

Second. There is another class of parties who, if their interest in the subject-matter is called to the attention of the court, it would require them to be brought in, if within the jurisdiction, *and if bringing them in* would not *oust* the jurisdiction of the court, but who are not so indispensable to the relief asked as would prevent the court from entering a decree in their absence. This class are called "necessary parties." Chadbourne v. Coe, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 481; Williams v. Bankhead, 19 Wall. 571, 22 L. ed. 184; Donovan v. Champion, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 19 Mor. Min. Rep. 247; Kelley v. Boettcher, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 56, 64; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. supra; Union Mill & Min. Co. v. Dangberg, 81 Fed. 73, 90; Morrison v. Burnette, 83 C. C. A. 391, 154 Fed. 617; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 828; Hunter v. Robbins, 117 Fed. 921. Thus, where a party is interested in the controversy, or entitled to litigate the same question, but a decree can be made between the litigants properly before the court determining their interests without affecting his, then he is a necessary party, and may be omitted if his presence would be obnoxious to jurisdiction. Ibid.; Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 658; North Carolina Min. Co. v. Westfeldt, 151 Fed. 296; McConnell v. Dennis, 82 C. C. A. 501, 153 Fed. 549, 550; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610; Adams v. Woburn, 174 Fed. 194; Union Mill & Min. Co. v. Dangberg, 81 Fed. 90; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Insurance Co. of N. A. v. Svendsen, 74 Fed. 346.

Under this class are placed all parties having a "separable interest," as before explained. This fact is the test in determining whether a party with an interest in the subject-matter

may be omitted, so as to retain jurisdiction in the Federal court. *Ibid.*; *Omaha Hotel Co. v. Wade*, 97 U. S. 20, 24 L. ed. 918.

It is proper here to call your attention to the fact that this rule may sometimes be controlled by the complainant, as in cases where contracts are joint and several and the complainant elects to sue jointly, whereby diversity of citizenship is destroyed, when he could have sued separately and retained the diversity of citizenship. *Hooe v. Jamieson*, 166 U. S. 398, 41 L. ed. 1050, 17 Sup. Ct. Rep. 596; *Merchant's Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Peninsular Iron Co. v. Stone*, 121 U. S. 631, 30 L. ed. 1020, 7 Sup. Ct. Rep. 1010; *Raphael v. Trask*, 118 Fed. 779.

Necessary parties may not only be dismissed to retain jurisdiction, but such parties defendant may be dismissed at any time before judgment, if a question of jurisdiction is raised. Equity rule 47; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 553; *Insurance Co. of N. A. v. Svendsen*, *supra*; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Claiborne v. Waddell*, 50 Fed. 369; *North Carolina Min. Co. v. Westfeldt*, 151 Fed. 296; *Slater Trust Co. v. Randolph-Macon Coal Co.* 166 Fed. 178; *Davis v. Davis*, 89 Fed. 538; *Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 660; *Donovan v. Champion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 72, 73, 19 Mor. Min. Rep. 247. And this right to dismiss or dispense with parties is tested by the subject-matter. *Scott v. Donald*, 165 U. S. 116, 41 L. ed. 654, 17 Sup. Ct. Rep. 262; *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. 417, 418; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L.R.A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 629.

Third. There is a class of parties whose interests are so bound up in the subject-matter of litigation and the relief sought, that the court cannot proceed without them, or proceed to a final decree without affecting their interests; that is, their rights must be unavoidably passed upon in reaching a final decree. These are called "indispensable parties," and must be made parties, even though the effect would be to oust the jurisdiction of the court. *Sioux City Terminal R. & Warehouse*

Co. v. Trust Co. of N. A. *supra*; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 607, 610; Shields v. Barrow, *supra*; Wallin v. Reagan, 171 Fed. 763, 764; New Chester Water Co. v. Holly Mfg. Co. 3 C. C. A. 399, 3 U. S. App. 264, 53 Fed. 27; Williams v. Bankhead, 19 Wall. 571, 22 L. ed. 187; Chadbourne v. Coe, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 480; Morrison v. Burnette, *supra*; O'Neil v. Walcott Min. Co. 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 536 and case cited; Lawrence v. Southern P. Co. 165 Fed. 241; Mathieson v. Craven, 164 Fed. 471; Caylor v. Cooper, 165 Fed. 758; Lawrence v. Times Printing Co. 90 Fed. 28.

If then the issue arises, that parties who are indispensable have not been made, or it should appear during the trial, the court must either dismiss the case or hold it until they are made parties; and if to make them parties would destroy the diversity of citizenship, and thereby oust the jurisdiction of the court, then the court cannot entertain jurisdiction of that case, and should dismiss at once (Shields v. Barrow, 17 How. 142, 15 L. ed. 161; Christian v. Atlantic & N. C. R. Co. 133 U. S. 241, 33 L. ed. 592, 10 Sup. Ct. Rep. 260; Barney v. Baltimore, 6 Wall. 280-291, 18 L. ed. 825-828; Swan Land & Cattle Co. v. Frank, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 254; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. *supra*; Greer, M. & Co. v. Stoller, 77 Fed. 5; Raphael v. Trask, 118 Fed. 678; Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 246, 14 L. ed. 680); for the court cannot proceed if absent defendants are indispensable. Authorities above; Bland v. Fleeman, 29 Fed. 669; Gregory v. Stetson, 133 U. S. 579, 33 L. ed. 792, 10 Sup. Ct. Rep. 422; Gray v. Havemeyer, 3 C. C. A. 497, 10 U. S. App. 456, 53 Fed. 178; Oberlin College v. Blair, 70 Fed. 419; Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 624, 20 L. ed. 82; Hagan v. Walker, 14 How. 29, 14 L. ed. 312. Section 737, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 587, and equity rule 47 do not affect this rule of parties. Shields v. Barrow, 17 How. 139, 15 L. ed. 160; Duchesse d'Auxy v. Porter, 41 Fed. 69; Barney v. Baltimore, 6 Wall. 285, 18 L. ed. 826; Coiron v. Millaudon, 19 How. 115, 15 L. ed. 575; Conolly v. Wells, 33 Fed. 205; Gregory v.



Swift, 39 Fed. 708 and cases cited; Collins Mfg. Co. v. Ferguson, 54 Fed. 721; Gregory v. Stetson, 133 U. S. 587, 33 L. ed. 794, 10 Sup. Ct. Rep. 422. If then you have all the indispensable parties before the court, you may proceed without reference to proper or necessary parties. Tug River Coal & Salt Co. v. Brigel, 30 C. C. A. 415, 58 U. S. App. 320, 86 Fed. 818; Smith v. Lee, 77 Fed. 782.

It may be stated, then, that in testing the class to which the party belongs, the inquiry should be: Can the interest of the present and absent be separated? If not, the absent are indispensable parties, and the court cannot proceed without them. Ibid.; Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 450, 21 L. ed. 368; Land Co. v. Elkins, 22 Blatchf. 204, 20 Fed. 545; Fourth Nat. Bank v. New Orleans & C. R. Co. supra. Or it may be asked if the interest of the absent parties will be affected by the decree; if so, they are indispensable. Shields v. Barrow, 17 How. 139, 15 L. ed. 160; Northern Indiana R. Co. v. Michigan C. R. Co. 15 How. 246, 14 L. ed. 680.

To illustrate: If no relief can be given without accounting with an absent defendant, then you cannot proceed without him. Fourth Nat. Bank v. New Orleans & C. R. Co. 11 Wall. 630, 20 L. ed. 83; Bell v. Donohoe, 8 Sawy. 435, 17 Fed. 711; Raphael v. Trask, 118 Fed. 779; Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69; Duchesse d'Auxy v. Porter, 41 Fed. 68; Perrin v. Lepper, 26 Fed. 545. So in partition among joint owners (Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726), and also in case of cancelation of mortgage for fraud, mortgagor is an indispensable party. So stockholders, or parties in possession of real or personal property, are indispensable when the right to property is litigated. Ibid.; Massachusetts & S. Constr. Co. v. Cane Creek Twp. 155 U. S. 285, 39 L. ed. 153, 15 Sup. Ct. Rep. 91; Wilson v. Oswego Twp. 151 U. S. 56, 38 L. ed. 70, 14 Sup. Ct. Rep. 259; Scoutt v. Keck, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 904; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 569. So a trustee in a mortgage in a suit by bondholders. Ibid.; Missouri use of Public School Fund v. New Madrid County, 73 Fed. 306. 307; Thayer v. Life Association of America, 112 U. S. 717, 28 L.

ed. 864, 5 Sup. Ct. Rep. 355. See *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122; *Smith v. Lee*, 77 Fed. 779. (See "Trustees as Parties.")

The pledgee of a chose in action having an equitable interest should be made a party, and the pledgor is an indispensable party where the pledge is involved. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 57; *Smith v. Lee*, 77 Fed. 783.

So, a bailee, where the possession sued for is held to await the performance of a condition (*Wilson v. Oswego Twp.* 151 U. S. 65, 38 L. ed. 74, 14 Sup. Ct. Rep. 259; see *Lake Street Elev. R. Co. v. Ziegler*, 39 C. C. A. 431, 99 Fed. 122); but not a mere depository or stake holder (*Scoutt v. Keck*, 20 C. C. A. 103, 36 U. S. App. 586, 73 Fed. 904; *Reeves v. Corning*, 51 Fed. 778; *Central Trust Co. v. Benedict*, 24 C. C. A. 56, 49 U. S. App. 35, 78 Fed. 202; *First Nat. Bank v. Merchants' Bank*, 2 L.R.A. 469, 37 Fed. 658; but see *Perrin v. Lepper*, 26 Fed. 545); or agent having no personal interest (*Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 577).

In a suit to cancel a note, by the maker against the holder, an endorsee for collection is not a necessary party. *New York Constr. Co. v. Simon*, 53 Fed. 4; *Wood v. Davis*, 18 How. 469, 15 L. ed. 461.

So, in foreclosure of a mortgage, the mortgagor and mortgagee are indispensable (*Davis v. Mercantile Trust Co.* 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; *Coiron v. Milaudon and Tug River Coal & Salt Co. v. Brigel*, *supra*); and subsequent judgment and lien creditors are indispensable, if relief goes beyond simple foreclosure, and their interests would be affected by the decree (*Ibid.*; *Wabash, St. L. & P. R. Co. v. Central Trust Co.* 23 Fed. 514; *Howard v. Milwaukee & St. P. R. Co.* 101 U. S. 845, 849, 25 L. ed. 1083-1085). So a corporation is indispensable in transfer of stock on the books (*Kendig v. Dean*, 97 U. S. 425, 24 L. ed. 1062; *Crump v. Thurber*, 115 U. S. 56, 29 L. ed. 328, 5 Sup. Ct. Rep. 1154; but see *Williamson v. Krohn*, 13 C. C. A. 668, 31 U. S. App. 325, 66 Fed. 661); or when corporate rights are affected (*Swan Land & Cattle Co. v. Frank*, 148 U. S. 611, 37 L. ed. 580, 13 Sup. Ct. Rep. 691); or when creditor sues a part of the stock-

holders of a corporation (*Hale v. Coffin*, 114 Fed. 573, 148 U. S. 610-611). So are all partners in an action to vacate partnership transaction. *Bell v. Donohue*, 8 Sawy. 435, 17 Fed. 711. So all heirs in suit for fraudulent conversion by an administrator. *Bland v. Fleeman*, 29 Fed. 672. So adverse claimants in suits for conversion of notes. *Gregory v. Swift*, 39 Fed. 712.

The bill must set forth indispensable parties under all conditions, and it must set forth "necessary" parties, if within the jurisdiction, or it is objectionable, which may be reached by demurrer, plea, or answer. If, however, the parties set forth are not indispensable, that is, if their interest in the cause of action, is separable, and they are not within reach of the court's process, the court may proceed without them. Or if they be not indispensable, and within reach of the court's process, the court should bring them in, unless it would oust jurisdiction. Equity rule 22; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Ins. Co. of N. A. v. Svendsen*, 74 Fed. 346.

I will here call your attention to the fact that after jurisdiction has attached with proper parties before the court, then parties who if originally made parties would be dismissed to protect jurisdiction may on their own petition come into the case without affecting the jurisdiction of the court. *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 629; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; Equity Rule 47; U. S. Rev. Stat. 737-738, U. S. Comp. Stat. 1901, p. 587; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* supra, and cases cited; *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 185, 68 Fed. 736. This exception is based on the fact that such petition would only be ancillary to the main suit, in which diversity of citizenship is not necessary to give jurisdiction, as will be seen hereafter.

### *Unknown Parties.*

When the bill sets forth that the parties are unknown, the cause must proceed in the absence of a denial by answer.

Equity rule 48; *Alger v. Anderson*, 78 Fed. 729. See *Tug River Coal & Salt Co. v. Brigel*, supra, where the allegation that parties are unknown defeated jurisdiction.

From the discussion of parties so far to a bill, the following rules may be deduced and considered in framing a bill:

First. You *may* join all proper parties if you desire to do so.

Second. You *must* join all necessary parties if in the jurisdiction of the court, unless fatal to jurisdiction.

Third. You *must* join all indispensable parties without any exception.

It is proper to here call your attention again to section 8 of act of 1875, providing that in a certain class of cases, to wit, where suit is commenced to enforce a lien or claim, legal or equitable, or to remove any cloud or encumbrance on the title to real estate or personal property within the district where the suit was brought, the defendant or defendants not being inhabitants of or found within the district of said suit could be brought in by a "warning order," or by publication, the decree, however, only to affect the property, no personal judgment being allowed. In this character of cases you may now bring in a "necessary" or indispensable party who is beyond the territorial limits of the court's jurisdiction. *Massachusetts Mut. L. Ins. Co. v. Chicago & A. R. Co.* 13 Fed. 857.

The "necessary parties," being brought within the reach of process, though beyond the territorial jurisdiction of the court, by this act, should be made parties, as I think the act takes the character of cases mentioned therein out of the rule that "necessary" parties beyond the territorial jurisdiction of the court may be dispensed with.

## CHAPTER XLII.

### WHEN PARTIES ARE NUMEROUS.

Under the third exception to the general rule of parties, as stated in equity rule 48, referring to the condition where parties are numerous, it is submitted: That when parties are numerous, or if the question be one of general interest, and only a few may sue for the many, or when the parties from a voluntary association fairly represent the interests of all, the court will permit the few to sue for the many. *Watson v. National Life & Trust Co.* 88 C. C. A. 380, 162 Fed. 7-12; *United States v. Old Settlers*, 148 U. S. 480, 37 L. ed. 529, 13 Sup. Ct. Rep. 650; *Barnes v. Berry*, 156 Fed. 73; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union* Nos. 1 & 3, 90 Fed. 606; *Society of Shakers v. Watson*, 15 C. C. A. 632, 37 U. S. App. 141, 68 Fed. 730; *McArthur v. Scott*, 113 U. S. 340, 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Ayres v. Carver*, 17 How. 591, 15 L. ed. 179; *Smith v. Swormstedt*, 16 How. 302, 14 L. ed. 948.

The interest, however, must be in the subject-matter. *Scott v. Donald*, 165 U. S. 108, 41 L. ed. 648, 17 Sup. Ct. Rep. 262; *United States v. Coal Dealers' Asso.* 85 Fed. 252.

This rule is a very convenient one, because where parties are numerous their rights and liabilities are subject to change and fluctuations, by death and assignment, which would greatly impede the orderly progress of a suit under equity rules, which are provided only for reaching an issue, and preparing an equity case for hearing on its merits. For these reasons courts of equity have sought to eliminate the probability of these inconveniences. *Mandeville v. Riggs*, 2 Pet. 482, 7 L. ed. 493.

Mr. Justice Story laid down many years ago the rules governing parties when numerous, as follows:

First. When the object of the bill and the questions arising are of common or general interest to all.

Second. In cases where parties have formed a voluntary association for public or private purpose, and those who sue fairly represent the interest of all.

Third. Where parties are very numerous, and, though there may have been separate and distinct interests, yet it is impossible to bring them before the court without manifestly impeding the cause and ends of justice; but in those cases, where the rights and interests are distinct and separate, the rule would not apply unless the bill discloses a common interest or right sought to be established, enforced, or protected. *Bailey v. Tillinghast*, 40 C. C. A. 93, 99 Fed. 801. Though the interests be separate, the suit must be for an object common to all, or against numerous parties representing a common interest.

The few selected as parties must fairly represent the interests of all, so that a full and honest trial may be had. *Smith v. Swarmstedt*, *supra*. Thus, a creditor may sue for the benefit of all having like interests. Lastly, in considering the rule of parties, much depends on the prayer of the bill. The question is, Who are to be directly affected by the prayer, or have to act under it?

Equity rule 54 provides that when no account, payment, conveyance, or other direct relief is sought against a party to a suit not being an infant, the party need not appear unless required to do so by the prayer of the bill. The plain meaning of the rule is that no one should be made plaintiff who has no interest in the relief sought, and no one defendant from whom nothing is demanded. A person may be interested in the subject-matter, but if his rights are not put in issue so that some relief must be asked in your prayer, it is not necessary to make him a party. *Payne v. Hook*, 7 Wall. 432, 19 L. ed. 262; *Smith v. Lee*, 77 Fed. 780; *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 89, 90.

## CHAPTER XLIII.

### PARTIES IN SPECIAL CASES.

#### *Married Women as Parties.*

In suits by married women, the husband must join in all cases, unless their interests are antagonistic, or he refuses to join, then he must be made defendant; and in such cases the wife must sue by next friend. Equity rule 87; *Douglas v. Butler*, 6 Fed. 228; *Taylor v. Holmes*, 14 Fed. 498; *United States v. Pratt Coal & Coke Co.* 18 Fed. 708. Thus rule must be observed, as Federal courts will not follow State practice or State statutes creating a different rule in equity suits. *Wills v. Pauly*, 51 Fed. 257; *United States v. Pratt Coal & Coke Co.* supra. But they do follow State practice on the law side. *Texas & P. R. Co. v. Humble*, 38 C. C. A. 502, 97 Fed. 837; *Morning Journal Asso. v. Smith*, 4 C. C. A. 8, 1 U. S. App. 270, 56 Fed. 141; *Mehrhoff v. Mehrhoff*, 26 Fed. 13.

#### *Joint and Several Parties.*

Equity rule 51 provides that in all cases in which the plaintiff has a joint and several demand against several persons, either as principal or surety, it shall not be necessary to bring before the court all persons liable thereto, but the plaintiff may proceed against one or more of the parties severally liable, but plaintiffs must join as a general rule.

#### *Stockholders as Parties.*

Equity rule 94 provides that every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may be *properly asserted* by the *corporation*, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, and that the suit

is not a collusive one to confer on a court of the United States jurisdiction of a case of which it otherwise would not have cognizance. It must also set forth with particularity the effort to secure by plaintiff such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the cause of his failure to obtain such action. (Jan., 1882.) The rule was promulgated to give effect to the decision in *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827. It is self-explanatory and states under what conditions stockholders may become parties plaintiff in a bill in equity, and the conditions are imperative. *Venner v. Great Northern R. Co.* 153 Fed. 411 and cases cited; *Delaware & H. Co. v. Albany & S. R. Co.* 213 U. S. 435, 53 L. ed. 862, 29 Sup. Ct. Rep. 540; *Poor v. Iowa C. R. Co.* 155 Fed. 226; *Mills v. Chicago*, 127 Fed. 732; *Waller v. Coler*, 125 Fed. 821; *Gage v. Riverside Trust Co.* 156 Fed. 1006; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; *Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 628; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 459-463, 47 L. ed. 258, 259, 23 Sup. Ct. Rep. 157.

Failure to comply with rule does not raise a question of jurisdiction, but of authority of plaintiff to maintain the bill. *Illinois C. R. Co. v. Adams*, 180 U. S. 35, 45 L. ed. 412, 21 Sup. Ct. Rep. 251.

In *Bill v. Western U. Teleg. Co.* 16 Fed. 14, it was declared that the individual stockholder could only maintain suit against the corporation, when it was made to appear that he had exhausted all means to obtain redress in the corporation itself, and that he has made proper effort to get other stockholders to take action. *Ibid.*; *Macon, D. & S. R. Co. v. Shailer*, 72 C. C. A. 631, 141 Fed. 585; *Edwards v. Mercantile Trust Co.* 124 Fed. 381, 382; *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 451; *Squair v. Lookout Mountain Co.* 42 Fed. 732; *Quincy v. Steel*, 120 U. S. 248, 30 L. ed. 626, 7 Sup. Ct. Rep. 520; *Detroit v. Dean*, 106 U. S. 537-542, 27 L. ed. 300-302, 1 Sup. Ct. Rep. 500; *Porter v. Sabin*, 149 U. S. 478, 37 L. ed. 818, 13 Sup. Ct. Rep. 1008; *Savings & T. Co. v. Bear Valley Irrig. Co.* 112 Fed. 704; *Metcalf v. American School Furniture Co.* 108 Fed. 911; *Elkins v. Chicago*, 119 Fed. 957; *Bimber v. Calivada Colonization Co.* 110 Fed. 58.



See *Kessler & Co. v. Ensley Co.* 129 Fed. 397, where majority approved the refusal of the company to act, and it was held that the minority stock could not sue; nor when directors act under the advice of an attorney. *Hendrickson v. Bradley*, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508.

An individual stockholder bringing suit must show that the rights of the corporation are involved, and the corporation should be made a party to the suit, or the bill is demurrable. *Porter v. Sabin*, *supra*; *Eldred v. American Palace Car Co.* 44 C. C. A. 554, 105 Fed. 458; *Davenport v. Dows*, 18 Wall. 626, 21 L. ed. 938; *Groel v. United Electric Co.* 132 Fed. 252; *McMullen v. Ritchie*, 64 Fed. 262.

In *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450-462, 26 L. ed. 827-832, it is held that a stockholder must show: First. Some action done or threatened, by the directors or trustees which is beyond the authority conferred by the charter or the law; or a fraudulent transaction done or threatened among themselves, or with some other parties or the shareholders, which will result in injury to the company, or the other shareholders; or that a majority of the shareholders are illegally pursuing in the name of the company a course which is violating the rights of other shareholders, which can only be redressed in a court of equity, and under any of these grounds it must further be alleged that the complainant made an earnest effort to obtain redress from the directors and shareholders of the company; that he owned the stock when the transactions of which he complained occurred, or it was thereafter transferred to him by operation of law. *Ibid.*; *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 663; *Clarke v. Eastern Bldg. & L. Asso.* 89 Fed. 781; *Consolidated Water Co. v. San Diego*, 89 Fed. 272; *Hutton v. Joseph Bancroft & Sons Co.* 83 Fed. 17. As to allegation of ownership, see *Robinson v. West Virginia Loan Co.* 90 Fed. 772, and cases cited.

These conditions setting up the right of a stockholder to sue are not jurisdictional, but go simply to plaintiff's right to maintain the bill (*Illinois C. R. Co. v. Adams*, 180 U. S. 34-35, 45 L. ed. 413, 21 Sup. Ct. Rep. 251), and should be complied with under equity rule 94. *Ziegler v. Lake Street Elev. R. Co.* *supra*; *Eldred v. American Palace Car Co.* 99 S. Eq.—16.

Fed. 168; *Church v. Citizens' Street R. Co.* 78 Fed. 526; *Ryan v. Williams*, 100 Fed. 172.

There must be no collusion. Equity rule 94; *Kemmerer v. Haggerty*, 139 Fed. 693; *Groel v. United Electric Co.* 132 Fed. 252; *Detroit v. Dean*, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; *Farmington v. Pillsbury*, 114 U. S. 146, 29 L. ed. 117, 5 Sup. Ct. Rep. 807. See *Mills v. Chicago*, 127 Fed. 732; *Consumers Gas Co. v. Quinby*, 70 C. C. A. 220, 137 Fed. 882; *New Albany Waterworks v. Louisville Bkg. Co.* 58 C. C. A. 576, 122 Fed. 776. The suit must show amount of stock held by the stockholder, though suing in behalf of others. *Harvey v. Raleigh & G. R. Co.* 89 Fed. 115. As to the relation of the stockholders to the corporation, and when minority may sue, see *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 765; *Foster v. Bank of Abingdon*, 88 Fed. 606, 607.

The rules above given do not apply when a suit is brought by depositors against directors who have wrecked the bank. *Foster v. Bank of Abingdon*, 88 Fed. 604-607. Nor when the directors are charged with wrecking the bank (*Ibid.*; *Excelsior Pebble Phosphate Co. v. Brown*, 20 C. C. A. 428, 42 U. S. App. 55, 74 Fed. 323; *De Neufville v. New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299); or with being guilty of fraudulent acts causing irreparable injury to corporate interests (*Foster v. Mansfield, C. & L. M. R. Co.* 36 Fed. 628; *McKee v. Chautauqua Assembly*, 124 Fed. 811). Nor when the demand would be useless. *Zeigler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662; *Weir v. Bay State Gas Co.* 91 Fed. 940; *Universal Sav. & T. Co. v. Stoneburner*, 51 C. C. A. 208, 113 Fed. 255; *Watson v. United States Sugar Refinery*, 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769-772; *Lamm v. Parrot Silver & Copper Co.* 111 Fed. 241; *Mumford v. Ecuador Development Co.* 111 Fed. 639; *Berwind v. Canadian P. R. Co.* 98 Fed. 158. Nor when the bill seeks a dissolution of the corporation and a distribution of its assets. *Taylor v. Decatur Mineral & Land Co.* 112 Fed. 449. Nor when the jurisdiction depends on a Federal question. *Lindsley v. Natural Carbonic Gas Co.* 162 Fed. 957; *Kimball v. Cedar*

Rapids, 99 Fed. 130; Dickinson v. Consolidated Traction Co. 114 Fed. 241. Nor when the cause of action antedates the right as stockholder. Rogers v. Penobscot Min. Co. 154 Fed. 606. The provision requiring a bill to be sworn to does not apply to cases removed. Maeder v. Buffalo Bill's Wild West Co. 132 Fed. 280.

In a suit by a creditor to enforce the individual liability of stockholders, the corporation and stockholders must be made parties. Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30 C. C. A. 632, 58 U. S. App. 83, 87 Fed. 252, 84 Fed. 76; Continental Adjustment Co. v. Cook, 152 Fed. 652; Fernald v. Glenn, 12 C. C. A. 27, 26 U. S. App. 202, 64 Fed. 49; Sidway v. Missouri Land & Live Stock Co. 116 Fed. 382. Of national banks, see Williamson v. American Bank, 109 Fed. 36. Stockholders need not be made parties to adjust the liabilities of the corporation.

A bill asking a receiver and seeking to make the stockholders liable must make the corporation a party. Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 84 Fed. 76, 87 Fed. 252. A receiver can bring an action against all stockholders, though he has a separate suit against each. Bausman v. Denny, 73 Fed. 70, but see Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244, and Fidelity Trust & S. D. Co. v. Archer, 179 Fed. 32.

The corporation need not be a party to a suit against a stockholder to try title to stock. Higgins v. Baltimore & O. R. Co. 99 Fed. 640. And when suit is brought by the corporation to cancel stock the trustee need not be made a party. Lake Street Elev. R. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 114.

### *Partnership—Parties.*

As a general rule, partnership rights and liabilities cannot be determined unless all the partners are parties to the bill (Bill v. Donohoe, 17 Fed. 711; Raphael v. Trask, 118 Fed. 779, 194 U. S. 277, 48 L. ed. 978, 24 Sup. Ct. Rep. 647), and they are indispensable parties. Ibid. But sometimes one member of a partnership may desire to file a bill in which the others refuse to join, in which case those who refuse to join must be made defendants. Edgell v. Felder, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69.

Sometimes, also, it occurs that because of the citizenship of one or more of the partners the jurisdiction of the Federal court would be ousted, and, being indispensable parties, they cannot be dismissed so as to give jurisdiction. (See "Citizenship of Partners.") *Ruble v. Hyde*, 1 *McCrary*, 513, 3 *Fed.* 331; *Ralya Market Co. v. Armour & Co.* 102 *Fed.* 532-533; see *Great Southern Fire Proof Hotel Co. v. Jones*, 177 *U. S.* 458, 44 *L. ed.* 845, 20 *Sup. Ct. Rep.* 690; see, also, *Hall v. Lanning*, 91 *U. S.* 160, 23 *L. ed.* 271. I think this is the true rule, but in *Smith v. Consumers Cotton Oil Co.* 30 *C. C. A.* 103, 52 *U. S. App.* 603, 86 *Fed.* 359, it was held that in an action against a firm having a member whose presence would oust the jurisdiction of the Federal court, the court could dismiss as to him. This ruling seems to be based on section 737 of the United States Revised Statutes, *U. S. Comp. Stat.* 1901, p. 587, authorizing dismissal of such defendants who are neither inhabitants of nor found in the district, but this section has never before been applied to nonresident defendants who are indispensable parties, as in partnerships.

Where a nonresident partner dies it is held that his representatives are not indispensable. *Perkins v. Hendryx*, 127 *Fed.* 448.

### *Representative Parties.*

I will now briefly discuss parties who appear in the record, not in their own, but in the interest of others, such as trustees, executors and administrators, and guardians *ad litem*, and receivers.

### *Guardians ad Litem.*

Equity rule 87 provides that guardians *ad litem* to defend a suit may be appointed by the court, or by a judge thereof, for infants or other persons under guardianship, or otherwise incapacitated for suing for themselves; and the same character of persons may sue by guardian, if any, or next friend, subject to such orders as the court may direct for the protection of these persons. *Bank of United States v. Ritchie*, 8 *Pet.* 144, 8 *L. ed.* 897; *Woolridge v. McKenna*, 8 *Fed.* 660. See in *Re*

Moore, 209 U. S. 496-497, 52 L. ed. 907, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164.

*Executors and Administrators as Parties.*

In discussing executors and administrators as parties in a Federal court, I will briefly speak of the jurisdiction of the Federal courts in probate matters.

The determination of the jurisdiction in cases of this character, as said in *Jordan v. Taylor*, 98 Fed. 645, is not free from difficulty. There has been conflict of opinion as to how far the Federal courts can interfere with the properties and rights of parties in an estate in due course of administration under the probate laws of the respective States. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*), 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; *Underground Electric R. Co. v. Owsley*, 169 Fed. 671, 99 C. C. A. 500, 176 Fed. 26; *Thiel Detective Service Co. v. McClure*, 130 Fed. 55; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Moore v. Fidelity Trust Co.* 70 C. C. A. 663, 138 Fed. 1; *Yonley v. Lavender*, 21 Wall. 279, 22 L. ed. 537; *Re Foley*, 80 Fed. 949; *Simmons v. Saul*, 138 U. S. 439-460, 34 L. ed. 1054-1063, 11 Sup. Ct. Rep. 369; *Hale v. Coffin*, 114 Fed. 575; *Bedford Quarries Co. v. Tomlinson*, 36 C. C. A. 272, 95 Fed. 210; *Lant v. Manley*, 71 Fed. 7. There is one principle connected with the subject which has been firmly established, and that is, when property is in possession of the probate court it cannot be taken or disturbed by another court. *Ibid.*; *Byers v. McAuley*, 149 U. S. 615, 37 L. ed. 871, 13 Sup. Ct. Rep. 906; *Yonley v. Lavender*, 21 Wall. 284, 22 L. ed. 539; *Jordan v. Taylor*, 98 Fed. 646; *Hale v. Coffin*, 114 Fed. 575; *McPherson v. Mississippi Valley Trust Co.* 58 C. C. A. 455, 122 Fed. 367, 368; *Hale v. Tyler*, 115 Fed. 835, and cases cited. An administrator appointed by a State court is an officer of that court, and his possession of the assets of the estate is the possession of the court. *Byers v. McAuley*, 149 U. S. 615, 37 L. ed. 871, 13 Sup. Ct. Rep. 906; *Williams v. Benedict*, 8 How. 112, 12 L. ed. 1008; *McPherson v. Mississippi Valley Trust Co.* 58 C. C. A. 455, 122 Fed. 367, 368. The States have conclusive control over estates of deceased per-

sons in their limits. *Ibid.*; *Yonley v. Lavender*, *supra*; *Underground Electric R. Co. v. Owsley*, 169 Fed. 671; *Kittredge v. Race*, 92 U. S. 121, 23 L. ed. 490; *Ball v. Tompkins*, 41 Fed. 490; *Lant v. Manley*, 71 Fed. 12; *Underground Electric R. Co. v. Owsley*, 99 C. C. A. 500, 176 Fed. 26. Thus, a non-resident creditor having judgment in a Federal court against a deceased person whose estate is being administered in a probate court of a State, cannot by process reach such estate (*Yonley v. Lavender*, *supra*; *Perry v. Bank of Cape Fear*, 20 Fed. 775; *Re Foley*, 76 Fed. 395, 80 Fed. 950, 951; *Ball v. Tompkins*, 41 Fed. 490; *Hale v. Tyler*, 115 Fed. 835); nor by bill to compel administrators to satisfy debt (*Bedford Quarries Co. v. Tomlinson*, *supra*; *McPherson v. Mississippi Valley Trust Co.* 58 C. C. A. 455, 122 Fed. 367). Nor will a bill lie in equity to dispossess administrators of control over decedent's estate. *Lant v. Manley*, 71 Fed. 12; *Re Foley*, 80 Fed. 951, and cases cited. Nor can jurisdiction be obtained by removal. *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 680; *Re Aspinwall*, 83 Fed. 852; *Copeland v. Bruning*, 72 Fed. 8. Nor can a Federal court probate a will (*Re Foley*, 80 Fed. 951; *Re Cilley*, 58 Fed. 984; *Tarver v. Tarver*, 9 Pet. 174-180, 9 L. ed. 91-93; *Fouvergne v. Municipality No. 2*, 18 How. 470, 15 L. ed. 399; *Ball v. Tompkins*, 41 Fed. 486; *Hale v. Coffin*, 114 Fed. 574; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327, discussed in *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 683-684. See *Cilley v. Patten*, 62 Fed. 498); or determine question of *testamentum vel non* (*Copeland v. Bruning*, 72 Fed. 8; *Oakley v. Taylor*, 64 Fed. 245; *Reed v. Reed*, 31 Fed. 53); but may entertain contest after probate (*Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 223-227; *Wart v. Wart*, 117 Fed. 766. See *Underground Electric R. Co. v. Owsley*, 169 Fed. 671); or set aside the probate. *Carrau v. O'Calligan*, 60 C. C. A. 347, 125 Fed. 657; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*), 199 U. S. 103, 50 L. ed. 108, 25 Sup. Ct. Rep. 727; *Broderick's Will* (*Kieley v. McGlynn*), 21 Wall. 509-517, 22 L. ed. 602-604; *Briggs v. Stroud*, 58 Fed. 720; *Simmons v. Saul*, 138 U. S. 450-459, 34 L. ed. 1059-1062, 11 Sup. Ct. Rep. 369; *Garrett v. Boling*, 15 C. C. A. 209, 37 U. S. App.

42, 68 Fed. 56. Nor can a Federal court administer an estate of a deceased person, either by original proceeding or removal (Clark v. Guy, 114 Fed. 783; Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; Re Foley, 80 Fed. 950; Copeland v. Bruning, supra); but the rule of noninterference is not applicable to property in hands of Federal court when owner dies (Rio Grande R. Co. v. Gornila [Rio Grande R. Co. v. Vinet], 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; Hale v. Tyler, 115 Fed. 835).

We thus see that the prohibition of any interference by Federal courts in probate matters, and in matters where the local courts have taken jurisdiction, rests upon the principle of noninterference with the *res* when State courts have assumed jurisdiction, as well as on the fact that Congress has not conferred on the circuit courts any probate powers. When, however, a suit can be brought originally against an executor or administrator in the *courts of the State*, with which the *Federal courts have concurrent jurisdiction*, then the suit may be brought in the Federal court, if the grounds of jurisdiction otherwise exist. Farrell v. O'Brien (O'Callaghan v. O'Brien), 199 U. S. 110, 50 L. ed. 111, 25 Sup. Ct. Rep. 727; Ingersoll v. Coram, 132 Fed. 172, 127 Fed. 418; Brun v. Mann, 12 L.R.A.(N.S.) 154, 80 C. C. A. 513, 151 Fed. 145; Wart v. Wart, 117 Fed. 766; Williams v. Crabb, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; Eddy v. Eddy, 93 C. C. A. 586, 168 Fed. 598; Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; Davis v. Davis, 89 Fed. 537; see Underground Electric R. Co. v. Owsley, 99 C. C. A. 500, 176 Fed. 26.

But a suit cannot be instituted in a Federal court in a State other than the State in which the estate is being administered, against an executor. Lawrence v. Southern P. R. Co. 177 Fed. 547. If the administration has been completed, and the property has passed out of the control of the probate courts, the Federal courts can avail themselves of their jurisdiction in law or equity, in reference thereto. Hale v. Coffin, 114 Fed. 575; Herron v. Comstock, 71 C. C. A. 466, 139 Fed. 371, 378; Hayes v. Pratt, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503; Spencer v. Watkins, 94 C. C. A. 659, 169 Fed. 379; or when State court has not taken possession of *res*. Hale v. Ty-

ler, 115 Fed. 838, 839. Or when the suit is one of acknowledged equity jurisdiction, as, when specific enforcement of a contract is brought against the heirs and administrator of a deceased person,—a Federal court of equity will enforce it, though the contract relates to property of an estate in process of administration. *Spencer v. Watkins*, supra; *Davis v. Davis*, 89 Fed. 537; and authorities. *Spencer v. Watkins*, 94 C. C. A. 659, 169 Fed. 379.

So, an heir may establish his right to a distributive share of the estate (*Byers v. McAuley*, 149 U. S. 620, 37 L. ed. 873, 13 Sup. Ct. Rep. 906; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *O'Callahan v. O'Brien*, 116 Fed. 934; *Rich v. Bray*, 2 L.R.A. 225, 37 Fed. 273), or the possession of real estate devised by will (*Harrison v. Rowan*, 4 Wash. C. C. 202, Fed. Cas. No. 6,143). So, a creditor may establish in a Federal court a debt against an estate (*Fondley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Hale v. Coffin*, 114 Fed. 568; see *Farmers' Bank v. Wright*, 158 Fed. 841; *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 272, 95 Fed. 208; *Johnson v. Waters*, 111 U. S. 668-675, 28 L. ed. 556-559, 4 Sup. Ct. Rep. 619; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; *Payne v. Hook*, 7 Wall. 431, 19 L. ed. 262); or a lien on the undivided shares (*Ingersoll v. Coram*, 127 Fed. 418; *Continental Nat. Bank v. Heilman*, 81 Fed. 42-43; see *Schurmeier v. Connecticut Mut. L. Ins. Co.* 60 C. C. A. 51, 124 Fed. 865, s. c. 69 C. C. A. 22, 137 Fed. 42); but the classification of claims by probate law binds the Federal courts (*Dodd v. Ghiselin*, 27 Fed. 407). Or a suit after final account rendered may be brought against the administrator or executor who holds in trust. *Colt v. Colt*, 111 U. S. 566, 28 L. ed. 520, 4 Sup. Ct. Rep. 553. Or a court of equity may decree a discovery and accounting against an executor. *Plume & A. Mfg. Co. v. Baldwin*, 87 Fed. 785; *Pulliam v. Pulliam*, 10 Fed. 23; *Davis v. Davis*, 89 Fed. 537; *Eddy v. Eddy*, 93 C. C. A. 586, 168 Fed. 591.

So, a bill in equity will lie, in the enforcement of a trust, to compel an administrator to account for and distribute assets wrongfully withheld (*Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Johnson v. Waters*, 111 U. S. 640, 28 L. ed. 547, 4 Sup.



Ct. Rep. 619; *Hayes v. Pratt*, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503); but not to disturb the possession of an administrator rightfully holding the assets (*Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906). When praying an account against executors, all must be joined if more than one (*Howth v. Owens*, 29 Fed. 724; *Conolly v. Wells*, 33 Fed. 210); unless one be nonresident (*Plume & A. Mfg. Co. v. Baldwin*, 87 Fed. 785), and may be dispensed with under U. S. Rev. Stat. § 737, U. S. Comp. Stat. 1901, p. 587, or if the executor has not administered (*Providence Rubber Co. v. Goodyear*, 9 Wall. 791, 19 L. ed. 567; *Conolly v. Wells*, 33 Fed. 210, 211).

*When Fraud Intervenes.*

A court of equity will take jurisdiction of a suit by a non-resident to set aside a decree of a probate court for fraud (*Arrowsmith v. Gleason*, 129 U. S. 99-100, 32 L. ed. 635, 9 Sup. Ct. Rep. 237; *Johnson v. Waters*, 111 U. S. 668-675, 28 L. ed. 556, 559, 4 Sup. Ct. Rep. 619; *Dodd v. Ghiselin*, 27 Fed. 405; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Arrowsmith v. Gleason*, 46 Fed. 256); or to set aside a fraudulent conveyance made by the decedent, if the probate court has not taken possession (*Hale v. Tyler*, 115 Fed. 834); or to set aside fraudulent allowances by an administrator (*Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; and authorities; *Dodd v. Ghiselin*, 27 Fed. 407); or fraudulent conveyances by the administrator (*Rhino v. Emery*, 18 C. C. A. 600, 37 U. S. App. 575, 72 Fed. 386; *Terry v. Bank of Cape Fear*, 20 Fed. 775; *Marshall v. Holmes*, 141 U. S. 599, 35 L. ed. 874, 12 Sup. Ct. Rep. 62; *Hale v. Tyler*, 115 Fed. 838; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Northern P. R. Co. v. Kurtzman*, 82 Fed. 243; *Daniels v. Benedict*, 50 Fed. 354; *Dodd v. Ghiselin*, *supra*; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 19, and cases cited).

## CHAPTER XLIV.

### TRUSTEES AS PARTIES.

Equity rule 49 provides that when real estate is vested in trustees, with power to sell and receive the purchase money and rents and profits of the estate, such trustee may sue alone, without making persons beneficially interested parties to the bill. *Allen-West Commission Co. v. Brashear*, 176 Fed. 121, and cases cited; *Harrison v. Stewart*, 93 U. S. 160, 23 L. ed. 845; *Re E. T. Kenney Co.* 136 Fed. 455, and cases cited; *Bowling Green Trust Co. v. Virginia Pass. & P. Co.* 132 Fed. 921; *Hayes v. Pratt*, 147 U. S. 570, 37 L. ed. 284, 13 Sup. Ct. Rep. 503; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 611, 25 L. ed. 758; *Ritcher v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106, 207; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 548, 89 S. W. 552; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Caylor v. Cooper*, 165 Fed. 757; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119. So, beneficiaries are bound by judgments against the trustee in such cases. *Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup. Ct. Rep. 106; *Kent v. Lake Superior Ship Canal R. & Iron Co.* 144 U. S. 90, 36 L. ed. 357, 12 Sup. Ct. Rep. 650; *Rumsey v. Peoples R. Co.* 154 Mo. 215, 55 S. W. 624; *Fletcher v. Ann Arbor*, 53 C. C. A. 647, 116 Fed. 481; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 519. And it is held that such trustees, in respect to litigation touching the trust property, have the same relative position to the property that executors and administrators hold to the personal estate of the decedent in litigation. *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Allen-West Commission Co. v. Brashear*, 176 Fed. 121, and cases cited.

When the subject-matter of a trust is in controversy, all trustees should be made parties, notwithstanding section 737, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 587. This statute

does not apply to trustees in the classes of suits provided in equity rule 49, nor in restraining trustees from certain acts in reference to the trust, or for breach of duty not involving actual fraud. *Wall v. Thomas*, 41 Fed. 621; *Boyd v. Gill*, 21 Blatchf. 543, 19 Fed. 146; *Hazard v. Durant*, 19 Fed. 476. So, one of three trustees has no authority to institute a suit without the others or their knowledge. *McGeorge v. Bigstone Gap. Improv. Co.* 88 Fed. 599.

Trustees are always necessary parties in a suit to defeat the trust (*McArthur v. Scott*, 113 U. S. 396, 28 L. ed. 1033, 5 Sup. Ct. Rep. 652; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 122 Fed. 921; *Rejall v. Greenhood*, 35 C. C. A. 97, 92 Fed. 945; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 382, 383, 38 L. ed. 203, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Thayer v. Life Asso. of America*, 112 U. S. 717, 28 L. ed. 864, 5 Sup. Ct. Rep. 355; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762-767; *Guardian Trust Co. v. Whitecliffs Portland Cement & Chalk Co.* 109 Fed. 527; *Vetterlein v. Barnes*, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441); or to enjoin a sale of property under the trust (*Ibid.*; *Moody v. Flagg*, 125 Fed. 819; *Old Colony Trust Co. v. Wichita*, 123 Fed. 762); unless fraud charged only against the beneficiary.

So, when suit is brought to recover the property, or to reduce it to possession by the trustee, and his relations to the beneficiary are not affected, then he should sue alone. *Griswold v. Bacheller*, 21 C. C. A. 428, 40 U. S. App. 142, 75 Fed. 473; *Carey v. Brown*, 92 U. S. 172, 23 L. ed. 469; *Sullivan v. Thurmond*, (Tex. Civ. App.) 45 S. W. 394; *Ross v. Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466; *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 548, 89 S. W. 552; *Thompkins v. Thompkins*, 123 Fed. 207; *Dodge v. Tullays*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; *Smith v. Portland*, 30 Fed. 737. But otherwise, beneficiaries should be made parties.

So, seeking to reach the income of a trust estate through the rights and powers of a trustee, he must be made a party. *Spies v. Chicago & E. I. R. Co.* 30 Fed. 398; *Morgan v. Kansas P. R. Co.* 21 Blatchf. 134, 15 Fed. 55; *Barry v. Missouri, K. & T. R. Co.* 22 Fed. 631.

So, a trustee of bondholders refusing to sue must be made a

party defendant, or when a trustee holds securities of a corporation to secure outstanding bonds, he should be made a party in a suit to wind up a corporation. *Miles v. New South Bldg. & L. Asso.* 99 Fed. 4.

So in a suit to cancel a mortgage made by a trustee wrongfully. So in suit to foreclose a trust deed, the trustee should be party defendant. *Maher v. Tower Hotel Co.*, 94 Fed. 225.

So in suits against trustees by a stranger seeking to defeat the trust, and the trustee represents the beneficiaries in all things relating to their common interests, the beneficiaries need not be made parties. *Kerrison v. Stewart*, 93 U. S. 160, 23 L. ed. 845.

Equity rule 50 provides that in a suit to execute the trusts of a will it is not necessary to make the heir at law a party, unless the plaintiff is seeking to establish the will against the heir at law.

### *Beneficiaries as Parties.*

In suits respecting trust property brought by or against trustees, the beneficiaries are as a general rule, parties with the trustee, except as stated in equity rule 49, and when a trustee brings suit to recover the property, as heretofore stated. *Ebell v. Bursinger*, 70 Tex. 122, 8 S. W. 77; *Sawyer v. First Nat. Bank*, 41 Tex. Civ. App. 486, 93 S. W. 153; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Preston v. Carten Bros.* 80 Tex. 391, 16 S. W. 17; *Hall v. Harris*, 11 Tex. 303.

In all suits to wind up the trust and distribute the proceeds the beneficiaries should be made parties. *Wescott v. Wayne Agri. Works*, 11 Fed. 303.

In a suit by beneficiaries to compel a corporation to fulfil an agreement in a deed of trust, and not seeking to reach the security, the trustee need not be made a party. *Spies v. Chicago & E. I. R. Co.* 30 Fed. 397.

So a trustee of a corporation mortgage need not, in a suit by the beneficiaries, not affecting the lien, be made a party (*Holly Mfg. Co. v. New Chester Water Co.* 48 Fed. 880), when all the beneficiaries are substantially before the court; and this is especially true when the joinder of the trustee may oust the jurisdiction. Equity rule 47; *Lake Street Elev. R.*

Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 114. See Lawrence v. Southern P. Co. 165 Fed. 241.

So beneficiaries may sue without making the trustee a party, when the trustee is without power over the trust property (D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780), or a naked trustee, and when no relief is demanded against him. Lake Street Elev. R. Co. v. Ziegler, 39 C. C. A. 431, 99 Fed. 120. Holly Mfg. Co. v. Chester Co. 48 Fed. 880-891).

In a suit by beneficiaries a nonresident trustee may not be made a party if four out of five trustees are parties. Stewart v. Chesapeake & O. Canal Co. 4 Hughes, 41, 1 Fed. 361. Beneficiaries having a separate interest in a trust fund may join in an action against the trustee for its loss. Davenport v. Prince, 41 Fed. 323.

When one of several beneficiaries sue to declare and enforce an implied trust, all parties claiming an interest in the trust estate must be made parties. Hall v. Harris, 11 Tex. 303.

When a full investigation of the management of the trust fund is sought, all the beneficiaries must be made parties. Lauriat v. Stratton, 6 Sawy. 339, 11 Fed. 107.

When a trustee refuses to sue, the beneficiaries may sue, but must make the trustee a party defendant, unless the suit comes within one of the exceptions as above stated. Consolidated Water Co. v. San Diego, 92 Fed. 759; First Nat. Bank v. Radford Trust Co. 26 C. C. A. 1, 47 U. S. App. 692, 80 Fed. 569; Bowdoin College v. Merritt, 63 Fed. 213; Clyde v. Richmond & D. R. Co. 55 Fed. 448.

Or when the trustee neglects to defend the trust the beneficiaries may do so. Thus they may sue to remove cloud, though trustee has uncontrolled possession for five years. Bowdoin College v. Merrett, 54 Fed. 55.

A beneficiary may bring a suit when the trustee has acquired an adverse right. Webb v. Vermont C. R. Co. 9 Fed. 793. And where fraud has been committed by the trustees, or some of them, the beneficiary may sue some or all; that is, the tort may be considered joint or several. Wall v. Thomas, 41 Fed. 621; Boyd v. Gill, 21 Blatchf. 543, 19 Fed. 145.

### *Receivers as Parties.*

I have already alluded to the cases in which the fundamental

grounds of jurisdiction as in citizenship, Federal questions, and amount, arise to affect the right of the receiver to sue, or his liability to be sued, in a Federal court.

Section 3 of the judiciary act of 1888, embodied in sec. 66, chap. 4, New Code, has already been referred to, in which it is provided that every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of *any act or transaction* of his in carrying on the business connected with such property, without the previous leave of the court appointing him, but such suit shall be subject to the equity jurisdiction of the appointing court, if necessary to the ends of justice. *McNulta v. Lochridge*, 141 U. S. 330-332, 35 L. ed. 798-799, 12 Sup. Ct. Rep. 11; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335-340, 45 L. ed. 220-223, 21 Sup. Ct. Rep. 171; *Buckhannon & N. R. Co. v. Davis*, 68 C. C. A. 345, 135 Fed. 710; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; *International & G. N. R. Co. v. Wynne* (Tex. Civ. App.) 122 S. W. 50; *International & G. N. R. Co. v. Bradt* (Tex. Civ. App.) 122 S. W. 59; *J. J. Case Plow Works v. Finks*, 26 C. C. A. 46, 52 U. S. App. 253, 81 Fed. 529; *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 494; *St. Louis S. W. R. Co. v. Holbrook*, 19 C. C. A. 385, 41 U. S. App. 33, 73 Fed. 112; *Erb v. Morasch*, 177 U. S. 585, 44 L. ed. 898, 20 Sup. Ct. Rep. 819; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 118 Fed. 205. And the judgment obtained is conclusive on the Federal court as to the right to recover, but time and manner of payment rests with the Federal court. *Willcox v. Jones*, 101 C. C. A. 84, 177 Fed. 870.

Prior to this act, as has been said, it was a well-settled rule, and is now, except as limited by this section of the act of 1888, that a receiver could not be made a party defendant without leave of the court appointing him.

The rule now is, a receiver can be made a party defendant **in any court**, State or Federal, without leave of the appointing court, whenever the cause of action is based on *some act or transaction* of the receiver in administering the trust. If the cause of action does not come within the terms of the act, then you must obtain permission of the appointing court to make

him a party defendant, or you subject your case to dismissal, or the judgment obtained to be declared void. *Comer v. Felton*, 10 C. C. A. 28, 22 U. S. App. 313, 61 Fed. 737; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 734; *Grosscup v. German Sav. Bank*, 162 Fed. 951. U. S. Rev. Stat. § 614, does not authorize suit without permission, as to such acts and transactions as come within the rule. See *Dillingham v. Hawk*, 23 L.R.A. 517, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 496, and authorities. See *McNulta v. Lochridge*, 141 U. S. 329-331, 35 L. ed. 797-799, 12 Sup. Ct. Rep. 11, where any act or transaction of his was held to extend to the acts of his predecessors.

As to such *acts* and *transactions* the suits against receivers are taken out of the class of ancillary suits, and become original suits against receiver (*Gilmore v. Herrick*, 93 Fed. 526; *Pitkin v. Cowen*, 91 Fed. 599); and, as we have seen, the ground of Federal jurisdiction is important (*Ibid*).

When the receiver, however, is winding up an insolvent estate, and he sues for property belonging to the fund, or the foreclosure of a mortgage in behalf of the fund (*Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Bowman v. Harris*, 95 Fed. 917; *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500; *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 155, 95 Fed. 497; *Metropolitan Trust Co. v. Columbus, S. & H. R. Co.* 93 Fed. 689; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 280); or when permission is given by the court appointing the receiver, to sue him as to some claim or right in and to the property in the hands of the court (*Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 735; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279-280); or on a cause of action not arising out of any act or transaction of the receiver, as a bill in equity to collect assessments on stock (*Myers v. Hettinger*, 37 C. C. A. 269, 94 Fed. 372; *Bausman v. Denny*, 73 Fed. 69); or filing bill to quiet title (*Connor v. Alligator Lumber Co.* 98 Fed. 155), then the receiver may sue or be sued in the court appointing him, without reference to amount or citizenship, as the suit in such cases would be only ancillary to the main suit. *White v. Ewing*, 159 U. S. 39, 40 L. ed. 68, 15 Sup. Ct. Rep. 1018; *Carpenter v. Northern P.*

R. Co. 75 Fed. 850; Ray v. Pierce, 81 Fed. 882; Bottom v. National R. Bldg. & L. Asso. 123 Fed. 744; Root v. Woolworth, 150 U. S. 413, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136; Rouse v. Letcher, 156 U. S. 49-50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

A receiver of a national bank is not a necessary party to a suit to enforce a claim against the bank. Denton v. Baker, 24 C. C. A. 476, 48 U. S. App. 235, 79 Fed. 189; Speckert v. German Nat. Bank, 38 C. C. A. 682, 98 Fed. 153; Bank of Bethel v. Pahquioque Bank, 14 Wall. 384, 20 L. ed. 840.

A receiver need not be made a party when an ancillary suit is filed to foreclose a mortgage on property in the hands of a receiver (Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642); nor when he has surrendered the property sued for (Phelps v. Elliott, 29 Fed. 53).

### *Power to Sue in a Foreign Jurisdiction.*

The appointing court cannot give a receiver power to sue in another court of foreign jurisdiction, or go there and take possession of property (Booth v. Clark, 17 How. 328, 15 L. ed. 166; Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; Hale v. Allinson, 188 U. S. 56-68, 47 L. ed. 380-388, 23 Sup. Ct. Rep. 244; Edwards v. National Window Glass Jobbers Asso. 139 Fed. 797; Fowler v. Osgood, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 20; Hilliker v. Hale, 54 C. C. A. 252, 117 Fed. 220); even though ordered by the appointing court. (Great Western Min. & Mfg. Co. v. Harris, supra).



## CHAPTER XLV.

### PARTIES IN REMOVING CLOUD AND QUIETING TITLE.

Removing cloud from title has already been discussed in my lectures on Equity Jurisprudence, and I will simply state the rule of parties as applied in the Federal courts.

First. The bill can be filed by the party in possession having the legal title (*Wehrman v. Conklin*, 155 U. S. 325, 39 L. ed. 173, 15 Sup. Ct. Rep. 129; *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Kraus v. Congdon*, 88 C. C. A. 182, 161 Fed. 18; *Kennedy v. Elliott*, 85 Fed. 832; *Union Mill & Min. Co. v. Warren*, 82 Fed. 519; *Frost v. Spitley*, 121 U. S. 556, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 163, and cases cited; *United States Min. Co. v. Lawson*, 115 Fed. 1007), because, being in possession, he cannot bring trespass to try title, and therefore has no adequate remedy at law to protect his enjoyment. (*Harding v. Guice*, *supra*).

Second. It cannot be filed by a party having the legal title and out of possession, notwithstanding State statutes permit it (*Hudson v. Randolph*, 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 217; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 642, 47 L. ed. 633, 23 Sup. Ct. Rep. 434; *Northern P. R. Co. v. Amacker*, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 537; *Gordon v. Jackson*, 72 Fed. 89); *except* in cases where there is no adequate remedy at law and relief in equity is necessary, as in cases of wild lands clouded by tax titles, and purchasers not in actual possession (*Gordon v. Jackson*, 72 Fed. 88; *Gillis v. Downey*, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483, 19 Mor. Min. Rep. 253; *Wehrman v. Conklin*, 155 U. S. 328,

39 L. ed. 174, 15 Sup. Ct. Rep. 129; *Hudson v. Randolph*, 13 C. C. A. 402, 23 U. S. App. 681, 66 Fed. 216; *Kilbourn v. Sunderland*, 130 U. S. 505-515, 32 L. ed. 1005-1009, 9 Sup. Ct. Rep. 594; *Harding v. Guice*, 25 C. C. A. 352, 42 U. S. App. 411, 80 Fed. 165; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 557, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1129; See *Davidson v. Calkins*, 92 Fed. 231); or as to mining lands (*Willitt v. Baker*, 133 Fed. 937; *Gillis v. Downey*, 29 C. C. A. 286, 56 U. S. App. 567, 85 Fed. 483, 19 Mor. Min. Rep. 253; *Carter v. Thompson*, 65 Fed. 329, 18 Mor. Min. Rep. 134); or oil lands (*Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839. See *Kellar v. Craig*, 61 C. C. A. 366, 126 Fed. 630). So it may be stated.

Third. That the bill can be filed when neither party is in possession and plaintiff has the legal title, because there can be no controversy in law if neither party is in possession. *Holland v. Challen*, 110 U. S. 15-26, 28 L. ed. 52-56, 3 Sup. Ct. Rep. 495; *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 769; *Southern P. R. Co. v. Goodrich*, 57 Fed. 880; *Southern P. R. Co. v. Stanley*, 49 Fed. 264, 265.

Fourth. The bill cannot be filed against the defendant in possession (*Taylor v. Clark*, 89 Fed. 7; *Gordan v. Jackson*, 72 Fed. 89; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Gombert v. Lyon*, 80 Fed. 305; *Davidson v. Calkins*, 92 Fed. 232-236; *Adoue v. Strahan*, 97 Fed. 692), whether permitted by the State law or not, because ejectment is an adequate remedy at law. *Ibid.* *Rudland v. Mastic*, 77 Fed. 689; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Blythe v. Hinckley*, 84 Fed. 256; *Davidson v. Calkins*, 92 Fed. 239.

Then in these cases the bill must show that either the plaintiff is in possession, or that neither party is in possession; otherwise it cannot be filed. *Southern P. R. Co. v. Goodrich*, 57 Fed. 880; *Davidson v. Calkins*, 92 Fed. 239.

But it seems that, though an action at law was the proper remedy because of the position of the parties as to the property, yet where a bill was filed and both parties treated it as an equity suit, a decree will be enforced and not set aside. *Book v. Justice Min. Co.* 58 Fed. 828, 829.

## CHAPTER XLVI.

### DEFECT OF PARTIES AND ISSUE.

It has been seen that the principle on which a court of chancery acts is to dispose of the whole subject-matter in one suit and bind the rights of all persons interested in it. So a "defect of parties" is a good defense, unless under equity rule 22, providing that if any person other than those named as defendants shall be necessary or proper parties, the bill shall aver the reason they are not made parties, by showing they are out of the jurisdiction, or cannot be joined without ousting the jurisdiction of the Federal court as to other parties, and if out of the jurisdiction, the bill should further ask that they should be made parties if they should come within the jurisdiction. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791; *Story v. Livingston*, 13 Pet. 375, 10 L. ed. 207.

So if necessary parties that can be reached, and their presence does not oust jurisdiction, or indispensable parties, whether they can be reached or not, are wanting in the bill, and it is apparent, you should object by demurrer, and if not apparent, by plea or answer. *Story v. Livingston*, *supra*; *Moore v. Bank of the Metropolis*, 13 Pet. 311, 10 L. ed. 177; *Carey v. Brown*, 92 U. S. 173, 23 L. ed. 470; *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51.

If raised by demurrer (*Hubbard v. Manhattan Trust Co. supra*), then the demurrer must name the proper parties, and of course the same rule applies if the issue is raised by plea or answer (*Dwight v. Central Vermont R. Co.* 9 Fed. 785). So the rule must be applied if there be a misjoinder of parties, or parties are made who have no interest. *Ibid.*; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, *supra*; *Conolly v. Wells*, 33 Fed. 205; *Halstead v. Manning*, 34 Fed. 565; *Elkhart Nat. Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 76; *House v. Mullen*, 22 Wall. 46, 22 L. ed. 839. However, the addition

of a party having no interest may be struck out on motion, or striking out on demurrer is an answer to the demurrer. *Hubbard v. Manhattan Trust Co.* supra; *Badger Silver Min. Co. v. Drake*, 31 C. C. A. 378, 58 U. S. App. 129, 88 Fed. 52.

If a demurrer is interposed because of defect of parties, it must be filed by the rule day next succeeding the entry of appearance, as will be hereafter fully explained.

### *Form of Demurrer.*

A. B.	}		In the United States Circuit Court
vs.		In Equity.	....., sitting at .....
C. D.			for the..... District of

The demurrer of C. D., the defendant (or the joint and several demurrers, etc.) to the bill of complaint.

This defendant (or these defendants) not confessing any or all of the matters set forth in the bill of complaint to be true, demurs to said bill and says, that it appears by the bill that one G. H., mentioned in said bill is a necessary party to the complaint (or indispensable party), for that (here point out briefly the allegations of the bill showing the person named is a necessary or indispensable party and should be joined).

Wherefore defendant prays the judgment of the court whether he shall further answer said bill, and prays to be dismissed with costs.

R. F.,  
Solicitor, etc.

Certificate of counsel; affidavit of defendant.

If demurrer goes to misjoinder, use same form, changing allegations to suit facts.

If the bill does not show a want of parties, but the fact exists, then it must be met by a plea or suggested in the answer (*First Nat. Bank v. Hamor*, 1 C. C. A. 153, 7 U. S. App. 69, 49 Fed. 45; *United States v. Gillespie*, 6 Fed. 803; *Hubbard v. Manhattan Trust Co.*, and *Sheffield & B. Coal, Iron & R. Co. v. Newman*, supra); setting out who should be made parties. (*Ibid.*; *Howth v. Owens*, 29 Fed. 722; *Goldsmith v. Gililand*, 10 Sawy. 606, 24 Fed. 154; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, supra). The plea, if filed, must be filed on the next succeeding rule day after entering appearance, and you may use the following form:

Title and commencement as before, and proceed as follows: And for plea to said bill aver and say that one E. G. is a necessary (or indispensable)

party (if necessary, allege that he is a citizen of and residing in....., showing he is within the jurisdiction of court) to said bill, because (here state why he is a necessary or indispensable party); all of which matters this defendant avers to be true, and pleads the same in abatement (or in bar) of complainant's bill, and prays judgment, etc. (as before).

R. F.,  
Solicitor.

Certificate of counsel; affidavit of defendant.

29 Fed. 723.

While this is the regular course of pleading in equity, and may be used in case of defect of parties, yet the Supreme Court of the United States has promulgated two rules making such speedy disposition of all objections and suggestions as to parties that nothing but time is gained, or rather, wasted, in filing a plea in such cases. *United States v. Gillespie*, supra.

Equity rule 52 provides that where the defendant shall by his answer suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, in fourteen days after answer filed, to set down the cause for argument on the objection only, and the purpose for which the same is so set down shall be notified by an entry to be made in the clerk's order book to the effect following: "Set down for hearing on defendant's objection for want of parties."

This action is taken by plaintiff by simply addressing a note to the clerk to enter the order as above stated in the order book. This should be done, for the rule proceeds, "and when the plaintiff shall not set down his cause and proceed to a hearing, then, if defendant's objection be allowed, the plaintiff will not be entitled, as a matter of course, for an order to amend by adding parties, but the court is at liberty to dismiss his bill."

Equity rule 53 provides that if the defendant shall at the hearing of a cause object that a suit is defective for want of parties, not having made the objection by plea or answer, and therein specified by name or description of parties to whom the objection applies, the court may, in its discretion, make a decree saving the rights of the parties not joined.

By these rules it is seen that a suggestion in the answer of a defect of parties is all that is necessary to raise the issue, and instead of having to wait the ordinary time under the rules for a hearing, the plaintiff may, in fourteen days from filing the answer, settle the preliminary matter of parties, having those

added that should be joined, or eliminating those improperly joined. To induce the plaintiff to pursue this rule, it is declared on failure to do so that he loses his right of amendment as of course, and subjects his bill to dismissal by the court should it appear that the suggestion of the defendant as to parties should be found true at the final hearing.

On the other hand, equity rule 53, in order to induce the defendant to make the suggestion of a want of parties by answer, the court can, if the defendant waits until the final hearing to raise the question, proceed in disregard of the suggestion then, and enter a decree on the case, saving the rights of absent parties. *Mechanics' Bank v. Seton*, 1 Pet. 299-306, 7 L. ed. 152-155; *Keller v. Ashford*, 133 U. S. 626, 33 L. ed. 674, 10 Sup. Ct. Rep. 494. This rule, however, cannot apply when the absent parties are indispensable, but only when necessary parties or proper parties. The absence of indispensable parties prevents the court from proceeding, except to dismiss without prejudice, as before seen. *Young v. Cushing*, 4 Biss. 456, Fed. Cas. No. 18,156; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152.

It is further apparent by these rules that any objection for want of parties or misjoinder of parties, whether raised by demurrer, plea, or by suggestion in the answer, must point out and name the persons not joined or misjoined, and give reasons for the objection. See equity rule 20. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, supra; *Carey v. Brown*, 92 U. S. 171, 23 L. ed. 469; *Harvey v. Richmond & M. R. Co.* 64 Fed. 20; *United States v. Pratt Coal & Coke Co.* 18 Fed. 708.

But there are other grounds than those of non-joinder or misjoinder, the existence of which creates a defect of parties, and which should be raised and settled *in limine* by demurrer, plea, or suggestion in the answer.

Any person having an equitable right or remedy may, if *sui juris*, sue in his own name, and if not, may sue in the name of another, and the defendant has the right to have on the record some person *sui juris* who would be answerable for costs and bound by a decree. So, infancy, coverture, lunacy, or the non-existence of the character or capacity in which the party is suing, or the parties are sued, such as partners, executors, ad-

ministrators, trustees, or heirs, should be met by demurrer, plea, or answer at once, and settled *in limine*.

You will find equity rule 39 provides that the defendant shall be entitled, in all cases by answer, to insist on all matters of defense not being matters in abatement, or to the character of the parties, or matters of form, thus clearly indicating that these matters in abatement touching character and capacity must be settled *in limine*. *Sharon v. Hill*, 10 Sawy. 666, 26 Fed. 723; *Hewitt v. Story*, 39 Fed. 158; *Marshall v. Otto*, 59 Fed. 252.

Many of the Federal districts have local rules requiring all matters in abatement to be set up by preliminary answer in the nature of a plea, and upon issue joined the court determines it before the defendant is required to answer to the merits. *Marshall v. Otto*, *supra*.

If any of these objections be raised by the defendant, you may use the form given in the demurrer or plea for want of parties, except the stating part must present the specific objection, thus:

Where the bill is exhibited by an infant without next friend, you insert:

"That said plaintiff, before and at the time of filing his said bill, was and now is an infant under the age of twenty-one years, wherefore judgment is prayed," etc.

In the case of lunacy say:

"That plaintiff has been declared a lunatic by virtue of inquiry duly and legally made and judgment thereon, to which defendant asks leave to refer; that said judgment has never been set aside and remains in full force and effect," etc.

*Florida C. & P. R. Co. v. Bell*, 31 C. C. A. 9, 59 U. S. App. 189, 87 Fed. 369; *Dudgeon v. Watson*, 23 Blatchf. 161, 23 Fed. 161.

Or in case plaintiff or defendant are not administrators, etc., being the capacity in which they sue, or are being sued, the plea by the defendant must set up the fact clearly.

You must set up:

"That at the time of bringing the suit the so-called intestate was not dead and plaintiff could not be an administrator, or that letters of administration had been revoked, if they ever existed."

Or if defendant is sued as administrator, and is not, he must set up:

"That he was not at the time of filing the suit nor prior thereto (if such is the fact), nor is he now, administrator of A. B., as alleged, but the allegations seeking to charge him as administrator are not true," etc.

If it is a case of coverture, you may set up:

"That A. B. at the time of exhibiting the bill was then, and is now, a married woman, one.....being then, and is now, her husband, and fully capacitated to institute this suit in her behalf." Or, if sued, she may reply her coverture in the same way.

In each case the title, commencement, and form as given in the plea may be used.

### *Making New Parties by Amendment.*

New parties may be made by amendment by plaintiff (*Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348), so may strike out; and defendant may force new parties by plea of non-joinder (*Goodman v. Niblack*, 102 U. S. 563, 26 L. ed. 232; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162; *Lewis v. Darling*, 16 How. 8, 14 L. ed. 822; *Leahy v. Haworth*, 4 L.R.A. (N.S.) 657, 73 C. C. A. 84, 141 Fed. 855; *Kaiser v. General Phonograph Supply Co.* 171 Fed. 432).



## CHAPTER XLVII.

### THE BILL.

The bill is the petition to the court containing the complaint and relief desired. In the old forms the complainant was styled "orator" or "oratrix," but this has gone into disuse, although occasionally used in some of the States, and the customary phrase, "plaintiff," is used.

The historical development of the present bill in equity, while interesting, is of no practical importance; I will therefore briefly allude to only two stages in its development, and the causes for the form it now assumes.

Anciently the complainants made to the chancellor their complaints verbally, and the defendant brought in and compelled to answer under oath the charges made. In process of time the charges were reduced to writing, and questions formulated in the petition for the defendant to answer. The petition thus framed was called a bill, and the defendant was required to answer in writing to each specific question, without evasion.

In this way the conscience of the defendant, through fear of ecclesiastical punishment, was purged, discovery had, and the answer thus made performed the double function of pleading and proof.

With the gradual development of the chancery practice, the bill assumed a stated form and was divided into nine parts:

First. Title and address to court.

Second. Names and places of abode of plaintiff and defendant.

Third. Stating part of bill, or statement of case.

Fourth. Confederacy clause. Alleging unlawful combination of the defendant to injure, etc., the plaintiff.

Fifth. Charging part of the bill, so called, because the plaintiff, by anticipation, charged that the defendant would set up certain excuses and pretenses to defeat plaintiff's right, which plaintiff denied or avoided in his bill.

Sixth. Jurisdiction clause. That plaintiff was remediless at law.

Seventh. Interrogatory part, in which the plaintiff sought, by questions based on the stating part of his bill, to make discovery by purging the conscience of the defendants as to the truth of the statements made.

Eighth. Prayer for relief.

Ninth. Prayer for process.

It was long necessary to adhere to these formal divisions to sustain a bill in equity, but as the perplexity of business increased with an advancing civilization; and greater breadth of jurisdiction was acquired, it was found that adherence to these divisions unduly lengthened the bill and rendered them very obscure. Lord Chancellor Campbell declared that he remembered when bills in equity told the same story over and over again, and each time more obscurely. Prolivity, tautology, scandal, and impertinence became the leading features in a bill in equity.

It was sought to overcome this fault in England by confining the bill to fifteen sheets, but the chancery lawyer met this rule by enlarging the sheets, and this evasion carried to such an extent that a further order was promulgated allowing only fifteen lines to a sheet. *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 57; Story Eq. Pl. § 226. These conditions may be said to have existed when the practice of the High Court of Chancery of England was adopted in our Federal system.

The Supreme Court of the United States, to overcome these cumbersome methods promulgated rules practically reducing the form of the bill to four divisions, and otherwise greatly simplifying its structure.

By equity rule 21 you could omit the confederacy clause, the charging part of the bill, and the jurisdictional clause. *Gage v. Kaufman*, 133 U. S. 471, 33 L. ed. 725, 10 Sup. Ct. Rep. 406. So the parts retained were:

First. Title of case and address to the court.

Second. Names of parties and citizenship of plaintiff and defendant.

Third. Statement of the case.

Fourth. The prayer for relief and process.

Each of these parts I will now discuss. **Equity rule 20** requires that the introductory part of the bill shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. *United States v. Pratt Coal & Coke Co.*, 18 Fed. 708.

The form should be substantially as follows:

A. B. }		In the Circuit Court of the United
vs. }	In Equity.	States for the.....District
C. D. }		of....., sitting at.....

To the Judges of the Circuit Court of the United States for the.....  
District of Texas:

A. B., a citizen of the State of....., residing in.....county, in said State, brings this his bill against C. D., a citizen of the State of....., and residing in.....county, in said State.

And therefore complainant (or plaintiff or your orator) complains and says that, etc.

If the bill is by a corporation, or against a corporation, you may say:

The (name of corporation), a corporation duly organized by and existing under the laws of the State of ....., and having its principal place of business at ....., in said State, and a citizen of said State, humbly complains, etc.

If the suit be against a corporation, proceed and say, "humbly complains of the (name of corporation), a corporation organized and existing under the laws of the State of ....., and having its principal place of business at ....., in said State, and a citizen and inhabitant of the ..... District, in same State."

The simple allegation that a corporation is a citizen of a State is not sufficient (*Swafford v. Templeton*, 108 Fed. 309); you must set forth a corporate name, followed by the averment that the same is a corporation created under the laws of the State of ..... and having its principal place of business at ..... *Shiras*, Eq. Pr. § 34; *Knight v. Lutchter & M. Lumber Co.* 69 C. C. A. 248, 136 Fed. 404; *Mueller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Dalton v. Milwaukee Mechanics Ins. Co.* 118 Fed. 876; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696; *DeLay v. Travelers Ins. Co.* 59 Fed. 319; *Ameri-*

can Sugar Ref. Co. v. Johnson, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 504; Lee v. Atlantic Coast Line R. Co. 150 Fed. 800; Winkler v. Chicago & E. I. R. Co. 108 Fed. 305; St. Louis, I. M. & S. R. Co. v. Newcom, 6 C. C. A. 172, 12 U. S. App. 503, 56 Fed. 951; Tug River Coal & Salt Co. v. Brigel, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 627. See Chicago Lumber Co. v. Comstock, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 480.

In New York & N. E. R. Co. v. Hyde, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 192 and United States v. Harsha, 6 C. C. A. 178, 16 U. S. App. 13, 56 Fed. 953, "Corporation duly incorporated by law, having principal place of business in Massachusetts," held, not good. "That defendant is a corporation conducting a railroad in another State," held, not good.

It has always been required in bills in equity that the names and places of residence of the plaintiff should be carefully set forth, but its purpose was to prevent fictitious persons from bringing suit, and that the defendant might show where to resort to compel obedience to any order of the court, such as to pay costs that may be awarded; but the accurate statement required in the Federal system is essential to show jurisdiction, when dependent on diversity of citizenship, as heretofore explained.

The great majority of cases brought into the circuit courts of the United States are dependent for jurisdiction on diversity of citizenship, and whether brought into said courts originally or by removal from State courts, or citizenship and alienage, it is a universal rule that the jurisdiction of these courts must appear in the bill. Wolfe v. Hartford Life & Annuity Ins. Co. 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; United States v. Harsha, *supra*; Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 662, 42 L. ed. 316, 17 Sup. Ct. Rep. 925; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; Roberts v. Lewis, 144 U. S. 656, 36 L. ed. 582, 12 Sup. Ct. Rep. 781; Sharon v. Hill, 10 Sawy. 634, 23 Fed. 353, 355.

When dependent on diversity of citizenship the bill must not only show diversity of citizenship, but it must affirmatively show that it is brought in a Federal district of the State in

which either the plaintiffs or defendants are resident citizens, as before explained. Authorities above; *Donnelly v. United States Cordage Co.* 66 Fed. 613; *Bank of Winona v. Avery*, 34 Fed. 81. (See "Federal District of Suit.") And it is not to be inferred. *Wolfe v. Hartford Life & Annuity Ins. Co.* and *United States v. Harsha*, supra; *Lownsdale v. Gray's Harbor Boom Co.* 117 Fed. 983. See *Tonopah Traction Min. Co. v. Douglass*, 123 Fed. 936. You cannot allege that "parties were citizens of states other than the State of . . . . .," or that one claims to be a citizen of . . . . .," etc. (*Lownsdale v. Gray's Harbor Boom Co.* supra); or that defendants are citizens of (a) or (b) (*Van Horn v. Kittitas County*, 112 Fed. 1). It is not necessary to repeat jurisdictional averments in an amendment to the bill. *Mexican C. R. Co. v. Pinkney*, 149 U. S. 200, 37 L. ed. 701, 13 Sup. Ct. Rep. 859; *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 459, 460, 43 L. ed. 767, 19 Sup. Ct. Rep. 451. It is the party named in the bill that controls, not those that may be proper or even necessary. *Re Stutsman County*, 88 Fed. 337. As said above, you cannot infer citizenship and residence, nor can you allege that their State residence is unknown; they must be citizens of a named State. *Tracy v. Morel*, 88 Fed. 801; *Tug River Coal & Salt Co. v. Brigel*, supra. You can allege, it seems, that a defendant is a citizen of the United States and a resident of a State. *Littell v. Erie Co.* 105 Fed. 539; *Clausen v. American Ice Co.* 144 Fed. 723.

### *Citizenship Not Residence.*

You cannot aver simply residence; it must be citizenship. Citizenship is the test. *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 382, 48 L. ed. 1029, 24 Sup. Ct. Rep. 696; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 732; *Denny v. Pironi*, 141 U. S. 123, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Shaw v. Quincy Min. Co.* 145 U. S. 447, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 655, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709; *Timmons v. Elytown Land Co.* 139 U. S. 379, 35 L. ed. 195, 11 Sup. Ct. Rep. 585; *Sharon v. Hill*, 26 Fed. 342; *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 623; *Marks v. Marks*, 75 Fed. 321; *Wolfe v. Hartford Life & Annuity Ins. Co.* supra; *Crosby v. Cuba R.*

Co. 158 Fed. 145-152; *Sanbo v. Union P. Coal Co.* 72 C. C. A. 24, 140 Fed. 713; *New York & N. E. R. Co. v. Hyde*, 5 C. C. A. 461, 5 U. S. App. 443, 56 Fed. 188. If only allegation of residence, the Supreme Court would reverse the case, though no objection taken. *Preferred Acci. Ins. Co. v. Barker*, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814. The term "inhabitant" cannot be substituted for "citizenship." *Allen B. Risley Co. v. George E. Rouse Soap Co.* 32 C. C. A. 496, 62 U. S. App. 240, 90 Fed. 6. As to sufficient allegation of citizenship, see authorities above; *United States v. Harsha*, supra; *Sun Printing & Pub. Asso. v. Edwards*, 194 U. S. 377, 48 L. ed. 1027, 24 Sup. Ct. Rep. 696. (See chapter 21.) Must be alleged. *Lownsdale v. Gray's Harbor Boom Co.* 117 Fed. 983. So in regard to an allegation of alienage. An allegation that a party is a resident of London does not show jurisdiction. *Bishop v. Averill*, 76 Fed. 387; *Stewart v. Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268. May be, and not be an alien. But an allegation that parties are all of Cognac, France, and citizens of the Republic of France, is good. *Hennessey v. Richardson Drug Co.* 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; *Von Voight v. Michigan C. R. Co.* 130 Fed. 398.

### *Federal District of Suit.*

The statute in case of diversity of citizenship only fixes the venue of suit in the district of plaintiff's residence, or in the district of defendant's residence. It is necessary to specifically allege the venue as required, and it must be shown that the suit is brought in the district court of the residence of plaintiff, or defendant, if you are depending on diversity of citizenship alone for jurisdiction. *Miller v. Pennsylvania R. Co.* 91 Fed. 298; *United States v. S. P. Shotter Co.* 110 Fed. 2; *Southern P. Co. v. Denton*, 146 U. S. 205, 206, 36 L. ed. 954, 13 Sup. Ct. Rep. 44.

If, however, the county of plaintiff's or defendant's residence and citizenship is alleged, the court will take judicial notice of the district to which the county belongs. But bear in mind that allegations of "residence" only in the county or district is not equivalent to citizenship. *Wolfe v. Hartford Life & An-*

nuity Ins. Co. *supra*; Denny v. Pironi, 141 U. S. 121-123, 35 L. ed. 657, 658, 11 Sup. Ct. Rep. 966; Gale v. Southern Bldg. & L. Asso. 117 Fed. 733. Diversity of residence does not give jurisdiction. Southwestern Teleg. & Teleph. Co. v. Robinson, 1 C. C. A. 91, 2 U. S. App. 148, 48 Fed. 769; Texas & P. R. Co. v. Rogers, 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378; Tinsley v. Hoot, 3 C. C. A. 612, 2 U. S. App. 548, 53 Fed. 682.

*Necessity of Accuracy.*

The jurisdiction of the court depending on the accuracy and fullness of the statement of the grounds upon which the jurisdiction rests, especially as to citizenship and residence, a failure so to do is fatal to jurisdiction, as every case is without the jurisdiction not affirmatively appearing to be in it. Goepfert v. Compagnie Generale Transatlantique, 156 Fed. 196-199; Robertson v. Cease, 97 U. S. 646-649, 24 L. ed. 1057-1059; United States v. S. P. Shotter Co. 110 Fed. 2, 3; Lownsdale v. Gray's Harbor Boom Co. *supra*; Turner v. Jackson Lumber Co. 87 C. C. A. 103, 159 Fed. 923; International Bank & T. Co. v. Scott, 86 C. C. A. 248, 159 Fed. 59-61. This rule applies only when jurisdiction is dependent upon diversity. Wright v. Skinner, 136 Fed. 694. And when a proper allegation is made it makes a *prima facie* case (Hill v. Walker, 92 C. C. A. 633, 167 Fed. 241), which continues until overcome by evidence creating a legal certainty. Where the allegation of citizenship was upon information and belief, it was held insufficient, in Wolff v. Archibald, 14 Fed. 369; Hambleton v. Duham, 10 Sawy. 489, 22 Fed. 465. See Holton v. Helvetia-Swiss F. Ins. Co. 163 Fed. 661. However, it is said in Sun Printing & Pub. Asso. v. Edwards, 194 U. S. 382, 48 L. ed. 1029, 24 Sup. Ct. Rep. 696, that the whole record may be looked to for the purpose of curing defective averment of citizenship, and facts constituting such allegations in legal intentment are sufficient, citing Horne v. George H. Hammond Co. 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; Howe v. Howe & O. Ball Bearing Co. 83 C. C. A. 536, 154 Fed. 822 and cases cited. Bowers v. New York L. Ins. Co. 68 Fed. 785; Lebert v. Hunt, 108 Fed. 450. In Adams Exp. Co. v. Adams, 159 Fed. 62, the defect was held to be cured by answer.

In the appellate courts the case will be dismissed if jurisdiction does not appear in the record, even though the question was not raised in the lower courts. The docket of the Supreme Court of the United States is strewn with wrecks of this character. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382-384, 28 L. ed. 463, 464, 4 Sup. Ct. Rep. 510; *Hancock v. Holbrook*, 112 U. S. 231, 28 L. ed. 715, 5 Sup. Ct. Rep. 115; *Neel v. Pennsylvania Co.* 157 U. S. 154, 39 L. ed. 654, 15 Sup. Ct. Rep. 589; *King Iron Bridge & Mfg. Co. v. Ottoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Parker v. Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726. An amendment will not be permitted in the appellate courts when the record nowhere shows jurisdiction. *Jackson v. Allen*, 132 U. S. 29, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Crehore v. Ohio & M. R. Co.* 131 U. S. 242, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616, and cases cited. However if the averment be made insufficiently it may be amended. *Johnson v. F. C. Austin Mfg. Co.* *supra*; *Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Glover v. Shepperd*, 11 Biss. 572, 15 Fed. 833.

In stating the necessity of accuracy it is not intended that there must be certainty to a certain intent, but general certainty without minute detail is sufficient.

### *Statement of the Case.*

Equity rule 26 requires that the statement of the case shall be expressed in as brief and succinct a manner as possible (*Nevada Nickel Syndicate v. National Nickle Co.* 86 Fed. 488; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 57), and shall contain no unnecessary recitals of deeds, documents, instruments, or contracts *in haec verba*, or any other impertinent matter. If it does, it may on exception be referred to a master to be stricken out at the cost of the pleader. *Board of Trade v. National Bd. of Trade*, 154 Fed. 239.

Equity rule 25 provides that, in order to promote brevity, and directness of allegation in the bill and answer, the regular taxable costs for every bill and answer shall not exceed three



dollars. So it appears that every inducement is held out for a brief, succinct, and direct allegation in the statement.

There are four component parts to make a complete case.

First. The bill must show that the complainant is the person entitled to relief.

Second. That the facts entitle complainant to relief.

Third. That the defendant is the person from whom the complainant should recover.

Fourth. That the claim set up is equitable.

To these may be added that if the case rests upon a Federal question, it must be shown in the statement of the case, and the amount, or value, of the subject-matter must be such as to give the jurisdiction.

These requirements of "statement" express a general formula in stating the case. I will now discuss them in detail and in the order stated. *Hobbs Mfg. Co. v. Gooding*, 100 C. C. A. 83, 176 Fed. 264, 265; *United States v. American Bell Teleph. Co.* 32 Fed. 593.

First. You must show the plaintiff has a right to the thing demanded, or such interest in it that he may sue.

The bill must set forth some title or interest in the property, contract or right which is the subject-matter of the litigation, and in respect of which he is about to suffer the injury complained of. If it be tangible property, he must show title, right, ownership, or possession. If it be a contract, he must show that he is a party to it originally, or by assignment. If it be a right out of which flows a duty, he must show a right to the performance of the duty. *Taylor v. Holmes*, 14 Fed. 499; *Savage v. Worsham*, 104 Fed. 18; *Selz v. Unna*, 6 Wall. 334, 18 L. ed. 801.

In setting forth the title, interest, or claim, facts, not inferences, must be alleged, nor can you rest upon conclusions of law. Mere averment of legal conclusion not good pleading. *Fuller v. Montague*, 8 C. C. A. 100, 16 U. S. App. 391, 59 Fed. 215; *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 676; *Gould v. Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 419; *Cornell v. Green*, 43 Fed. 107; *Dishong v. Finkbiner*, 46 Fed. 17; *Lumley v. Wabash R. Co.* 71 Fed. 28; *Butler v. National Home*, 144 U. S. 74, 36 L. ed. 352, 12 Sup. Ct. Rep. 581; *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476.

To illustrate: You should not allege simply that you are entitled to an equitable interest by virtue of an instrument, but you must state so much of the instrument as shows the interest or claim set up, and let the court determine the effect or character of the interest claimed. *Marshall v. Turnbull*, 34 Fed. 827; *Electric Goods Mfg. Co. v. Kiltonski*, 171 Fed. 552, 553. Set up always your facts; then there is no objection to drawing conclusions in your bill, which you think legitimate. *Berwind v. Canadian P. R. Co.* 98 Fed. 158; *Allen v. O'Donald*, 23 Fed. 576. However, in this you must bear in mind equity rule 26, providing that no unnecessary recitals of written instruments will be permitted. Much must be left to the discretion and good sense of the pleader.

Of course, if your right depends on the construction of the whole instrument, you may set it up in your bill *in haec verba*, without making your pleading obnoxious to the rule. *Einstein v. Schnebly*, 89 Fed. 541-549; *Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 486. The interest thus to be stated applies to every plaintiff, if there be more than one, and must be an actual existing interest, and not a probability; and whenever conditions precedent to the maturing of the interest appear, you must allege performance or tender of performance. *Ibid.* The statement should not be uncertain; if it is, the objection should be raised by demurrer, and not by motion. *Einstein v. Schnebly*, 89 Fed. 547; *Johnson v. Wilcox & G. Sewing Mach. Co.* 25 Fed. 373.

Second. It must appear that plaintiff is entitled to relief.

Mr. Heard remarks that this requirement in the stating part of the bill does not involve so much a question of pleading, but rather covers the whole subject-matter of equitable jurisdiction. This is true, and all that can be said by way of general direction is that when the title or interest claimed appears in the bill, then you must state the injury or deprivation of right clearly and accurately (*Savage v. Worsham*, *supra*; *Boston & A. R. Co. v. Parr*, 44 C. C. A. 139, 104 Fed. 695; *Knopholler v. St. Paul, M. & M. R. Co.* 1 McCrary, 299, 2 Fed. 302; *Bent v. Hall*, 56 C. C. A. 246, 119 Fed. 342; *Bishop v. York*, 118 Fed. 352); that the court may see that the relief you ask is not only equitable, but consistent with the claim set up.

A plaintiff may sue in equity on a promise to a third per-

son. *Green v. Turner*, 30 C. C. A. 427, 59 U. S. App. 252, 86 Fed. 838, and cases cited; *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831.

In showing that you are entitled to relief you may anticipate in your bill the defense that may be set up to defeat your case, either by answering or in the form of confession and avoidance. Equity rule 21.

Third. It must appear that the defendant is the party from whom the plaintiff should recover.

The bill must show that the defendant is liable. Of course, if he is in possession of the property sued for; or if the subject-matter of his suit is based on contract to which he is a party; or if he owe a duty, which in equity of good conscience he should perform,—then the statement of these conditions would be sufficient to show liability, if plaintiff shows an interest or right. The rule of precision in allegation is not applicable when it is necessary to show what claims the defendant sets up, or what interest, if any, he claims, as plaintiff cannot be supposed to know always the nature of the defendant's interest, especially when it can only be reached by discovery.

It sometimes happens that while plaintiff may have an interest in property in the hands of another, yet there is not that privity between them that will sustain a suit, so it must appear from the bill, not only that the interest exists, but that the status of the defendant to plaintiff and the subject-matter is such that the suit will lie, and the defendant is the party from whom the plaintiff should recover.

Fourth. That the claim set up is an equitable one.

This requirement has been fully discussed in the application of section 723, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 583, in bringing suits in equity. It is a fundamental rule that a bill in equity must state a case within the jurisdiction of a court of equity, and this, as you have seen, is shown either where the interest claimed is cognizable in equity, or whatever be the nature of the claim, if the complainant is entitled to relief in equity, because the remedy at law is inadequate.

### *Allegation of the Federal Question.*

When the jurisdiction depends on a Federal question, the

stating part of the bill must show that the suit arises under the Constitution and laws of the United States or treaties made, as has been before fully explained (see "Federal Questions," Chaps. 27, 28). *Kansas v. Atchison, T. & S. F. R. Co.* 77 Fed. 341-344; *Fergus Falls v. Fergus Falls Water Co.* 19 C. C. A. 212, 36 U. S. App. 480, 72 Fed. 877; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 872; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 39 L. ed. 85, 15 Sup. Ct. Rep. 34; *Postal Telegr. Cable Co. v. United States (Postal Telegr. Cable Co. v. Alabama)*, 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *East Lake Land Co. v. Brown*, 155 U. S. 488, 39 L. ed. 233, 15 Sup. Ct. Rep. 357; *Walker v. Collins*, 167 U. S. 57, 42 L. ed. 76, 17 Sup. Ct. Rep. 738. The rule is that the Federal question must appear in the bill itself (*Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35, and authorities above), and the bill must show a reliance upon it (*Pacific Gas Improv. Co. v. Ellert*, 64 Fed. 421). See *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769 where the allegation of a Federal charter was held sufficient.

### *Allegation of Amount.*

In the statement of the case the allegation of amount should show that the value of the subject-matter or amount in dispute is within Federal jurisdiction, that is, exceeds the sum of two thousand dollars, exclusive of interest and costs, and this must appear whether the jurisdiction be based on diversity of citizenship, or a Federal question, or between a citizen and an alien. (See Chaps. 30 to 36.) New Code effective Jan. 1, 1912, raises jurisdictional amount, and inserts "three" in place of "two" as above stated.

### *Allegation of Fraud.*

Where relief is sought because of imposition or fraudulent devices, the fraud should be alleged in the statement of the

case. It must distinctly state the particular act of fraud, misrepresentation, or concealment, and should specify how, when, and in what manner created. Such charges must be definite and reasonably certain, capable of proof, because they must be clearly proved. *Kennedy v. Custer*, 98 C. C. A. 584, 174 Fed. 981; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 754; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Hammond v. Hopkins*, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 577, 33 L. ed. 686, 10 Sup. Ct. Rep. 390; *Braddock v. Louchheim*, 87 Fed. 287; *Field v. Hastings & B. Co.* 65 Fed. 279; *Lumley v. Wabash R. Co.* 71 Fed. 21; *Bangs v. Loveridge*, 60 Fed. 966. And the charge would not of itself be sufficient unless injury shown. *Linn v. Green*, 5 McCrary, 380, 637, 17 Fed. 407. You cannot find fraud if allegations do not sustain the finding. *Dashiel v. Grosvenor*, 27 L.R.A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334.

### *Laches.*

Often in the statement of a case in a bill it appears some length of time has elapsed between the accrual of the right and the filing of the bill, so that the bill would be demurrable because of *laches*. This is an equity which ordinarily stays the hand of a court of equity in granting the relief asked, though an equitable cause of action has been properly stated. Whenever delay in bringing the suit appears, you must, to properly state your case, anticipate this defense, and reasonably excuse the delay, such as the existence of some disability, or a fraudulent concealment of the facts by the defendant, or it must be shown that in the nature of things the cause of action or fraud perpetrated could not sooner have been discovered. There must be distinct averments when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been sooner made. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 59; *Hammond v. Hopkins*, 143 U. S. 251, 36 L. ed. 145, 12 Sup. Ct. Rep. 418; *McIntire v. Pryor*, 173 U. S. 57, 43 L. ed. 613, 19 Sup. Ct. Rep. 352; *Root*

v. Woolworth, 150 U. S. 414, 37 L. ed. 1126, 14 Sup. Ct. Rep. 136; McMonagle v. M'Glinn, 85 Fed. 92; Hardt v. Heidmeyer, 152 U. S. 560, 38 L. ed. 552, 14 Sup. Ct. Rep. 671; Whitney v. Fox, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 713. See Ritchie v. Sayers, 100 Fed. 537.

Lastly, equity rule 21 provides that if in connection with the statement of the case it is desired to have relief by injunction, *ne exeat*, or any other special order pending the suit, it shall be specially asked for, but the stating part of the bill must contain the necessary allegations upon which to base the special relief, and the relief must accord with the case thus made.

I have thus pointed out in a general way the provisions of the stating part of a bill in equity. The stating part is the germ of the bill, for it is the plaintiff's case, and shows his title to relief. It should be positive and free from inference, looseness, and uncertainty of expression. The equity of your case must be shown there, for you cannot refer to other parts of the bill for it. If it omits material allegations you cannot supply them by proof (*Jackson v. Ashton*, 11 Pet. 249, 9 L. ed. 706), and its further importance is shown from the following facts:

First. That the defendant is not bound to answer any averments not contained in the stating part of the bill.

Second. If a plea is filed, the validity of it is determined by the stating part of the bill.

Third. It cannot be enlarged by the prayer for relief.

In a word, the stating part must be complete in itself, so that if admitted by the answer or proved by the evidence, the court can enter a decree disposing of the subject-matter.

## CHAPTER XLVIII.

### THE PRAYER.

We now come to the prayer of the bill for relief and process. Prayer for relief must include both general and special relief. Equity rule 21. The prayer shall ask the special relief to which the complainant supposes himself entitled, and shall also contain a prayer for general relief out of abundant caution, as a general prayer for relief and sufficient facts *alleged* saves the bill from a general demurrer. *Walden v. Bodley*, 14 Pet. 164, 10 L. ed. 401; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 397, 35 L. ed. 1056, 12 Sup. Ct. Rep. 188; *Stevens v. Gladding*, 17 How. 455, 15 L. ed. 158; *Patrick v. Iserhart*, 20 Fed. 339. And if any injunction or other auxiliary writ is required and justified by the stating part of the bill, it must be specially prayed for. *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 19.

The usual form is as follows:

“And plaintiff prays that upon final hearing of this cause that it be ordered and decreed (here insert special relief required) and for such other general relief as may to the court be deemed just and equitable.”

As to a proper prayer for an accounting see *Elkhart Nat Bank v. Northwestern Guaranty Loan Co.* 84 Fed. 78.

The general prayer cannot broaden relief beyond the pleadings, and care should be taken to ask all relief in the special prayer. *First Nat. Bank v. Woodrum*, 86 Fed. 1005, 1006; *Texas v. Hardenberg* (*Texas v. White*), 10 Wall. 68-85, 19 L. ed. 839-841; *Savings & Loan Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 702, 703. While this is the general rule, yet, under the general prayer the court can grant the relief according to the case made. *Underground Electric R. Co. v. Owsley*, 169 Fed. 671; *Tyler v. Savage*, 143 U. S. 98, 36 L. ed. 90, 12 Sup. Ct. Rep. 340; *Crawford v. Moore*, 28 Fed. 824; *English v. Foxall*, 2 Pet. 612, 7 L. ed. 537; *Swope v. Missouri Trust*

Co. 26 Tex. Civ. App. 133, 62 S. W. 950; Haggart v. Wilczinski, 74 C. C. A. 176, 143 Fed. 22-28; Patrick v. Isenhardt, 20 Fed. 339.

Where you are not certain of your specific relief, it is permissible to frame your prayer in the alternative, such relief being consistent with the case made. Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 5, 6; Hubbard v. Urton, 67 Fed. 419; Hardin v. Boyd, 113 U. S. 763, 28 L. ed. 1143, 5 Sup. Ct. Rep. 771; Rigney v. DeGraw, 100 Fed. 213; McGraw v. Woods, 96 Fed. 56. Thus in a suit to recover property procured by fraud, you may pray for the return or value. Hubbard v. Urton, 67 Fed. 425-426; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771. But a bill would be multifarious that contains prayers in the alternative that are antagonistic. Cutter v. Iowa Water Co. 96 Fed. 777.

If an injunction is desired and your allegation will support it, you may add to the prayer for process a special prayer for the injunction, as follows:

"Complainant prays the court to grant him a writ of injunction enjoining and restraining the said C. D., defendant, his attorneys, agents and representatives, from (insert act or special matter to be enjoined), until the further order of this court."

### *Ne Exeat.*

Equity rule 23 and U. S. Rev. Stat. § 717, U. S. Comp. Stat. 1901, p. 580, provide for issuing a writ *ne exeat regno*, as well as an injunction. Lewis v. Shainwald, 48 Fed. 492; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999. The writ of *ne exeat* is applied for if the defendant designs to quietly leave the United States, and there is a personal suit pending against him. It rests upon the allegation that his departure will produce a denial of justice and irreparable injury, or defeat the purpose of the suit. When proof is made, the judge will grant the prayer and issue a writ forbidding the departure of the defendant unless he gives security to abide the decree. See Mackenzie v. Barrett, 73 C. C. A. 280, 141 Fed. 965, 5 A. & E. Ann. Cas. 551, and cases cited; also in



Re Appel, 20 L.R.A.(N.S.) 76, 90 C. C. A. 172, 163 Fed. 1002.

Wherefore complainant prays the court to grant him a writ of "*ne exeat*," forbidding and restraining the said C. D., defendant herein, from departing beyond the limits of the United States without leave of the court first had and obtained, etc. Rev. Stat. § 717; Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678, 11 Sup. Ct. Rep. 972, 999; Lewis v. Shainwald, 48 Fed. 492. See New Code, sec. 261, chap. 11.

### *Prayer for Process.*

The prayer for process should be carefully stated, Equity rule 7, being one of the component parts of the bill (Goebel v. American R. Supply Co. 55 Fed. 826; Carlsbad v. Tibbetts, 51 Fed. 852-855; Armstrong Cork Co. v. Merchants' Refrigerating Co. 171 Fed. 778; United States v. Agler, 62 Fed. 824); and equity rule 23 requires prayer for process of subpœna to contain the names of the defendants set forth in the introductory part of the bill, and if any of them are known to be infants, or otherwise under guardianship, the fact shall be stated, that the court may take order therein upon the return of the process. However, where both in the caption and body of the bill the defendants who were required to answer were named and plainly designated, the omission of the prayer for process is not demurrable. The strictness of the ancient rule has been relaxed in this country. Jennes v. Landes, 84 Fed. 73-74; Buerk v. Imhaeuser, 8 Fed. 457 (waived by appearance).

### *Form of Prayer for Process.*

To the end that complainant may obtain the relief prayed for herein, he further prays the court to grant him process by subpœna directed to C. D. and E. F., etc., defendants herein named, commanding them to appear and answer under oath (or not under oath, the same being waived), all of the allegations of the bill herein filed, etc.

If any of the defendants are minors or under guardianship, or *non compos*, the fact should be stated, in order that proper service should be had and such action taken as is necessary to protect the interests of the parties. Equity rule 23.

*Amendment of Prayer.*

When the prayer is not consistent with the case made in the bill, it has been held that in some cases an amendment will be permitted at the hearing. *Neale v. Neale*, 9 Wall, 1, 19 L. ed. 590; *Graffam v. Burgess*, 117 U. S. 194, 29 L. ed. 843, 6 Sup. Ct. Rep. 686; *Re Wellhouse*, 113 Fed. 962; *Pendery v. Carleton*, 30 C. C. A. 510, 59 U. S. App. 288, 87 Fed. 41; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 415, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188; See *Rigney v. De Graw*, 100 Fed. 213; *Bass v. Christian Feigenspan*, 82 Fed. 261.

*Amend After Replication.*

But after replication an effort to enlarge the claim, and to change the character and quantity of the relief sought, was refused. Equity rule 29; *Bass v. Christian Feigenspan*, 82 Fed. 261; *Beavers v. Richardson*, 118 Fed. 320. The court in discussing equity rule 29, providing for amendments after replication upon proof that the matter of the proposed amendment is material, says that the purpose of amendment must not be to enlarge the case nor to change the character and quantity of relief asked, but when a case for relief is made out, but not that shown by specific request in the prayer, an amendment will be allowed, even on final hearing. It seems, then, that this amendment is allowed when plaintiff is entitled to different relief than asked for in the special prayer, but never to expand the claim or enlarge it beyond what is set out in the bill. (See "Amendment of Bills," and authorities above.) *Shields v. Barrow*, 17 How. 143, 144, 15 L. ed. 161, 162.

*Signing Bills.*

The bill must be signed by counsel, as it is considered an affirmation of good faith on his part, that there is ground for the suit in the manner which it is alleged and filed. Equity rule 24. The ancient rule of examining the bill by the chan-

cellor before permitting it to be filed was in process of time discontinued, and it was left to the honor of the Bar that the bill would be framed without scandal or impertinence, and the relief is sought in good faith, which was evidenced by his signature. *Brinkley v. Louisville & N. R. Co.* 95 Fed. 349, 350; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 829, 830.

### *Verifying Bill.*

It is not necessary, unless an injunction or some special order or process is asked, to preserve some right pending the suit, or when specially required by some rule of equity, as in equity rule 94, when a stockholder brings a bill against the corporation, or required by statute. *Hughes v. Northern P. R. Co.* 18 Fed. 110; see, also, *Black v. Henry G. Allen Co.* 9 L.R.A. 433, 42 Fed. 622. Nor need an amendment to the bill be verified. *Chase Electric Constr. Co. v. Columbia Constr. Co.* 136 Fed. 699.

### *Form of Verification.*

STATE OF ..... }  
County of..... }

Personally appeared before the undersigned authority, A. B., the plaintiff in the above cause, who, being duly sworn as to the truth of the allegations made in the above bill, says that he has read the foregoing bill (or heard it read) and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true.

[SEAL.]

*Officer's signature.*

In *Fitchel v. Barthel*, 173 Fed. 491 it is said a bill neither signed or verified is not demurrable, as neither are required by the rules.

## CHAPTER XLIX.

### BILLS WITH DOUBLE ASPECT.

While a bill in equity should be single in purpose, yet it sometimes becomes necessary to draw it with a double aspect, or state an alternative case; however, it must be the foundation for precisely the same relief, and consistent with the case made (*Shackleton v. Baggaley*, 95 C. C. A. 505, 170 Fed. 57; *Shields v. Barrow*, 17 How. 144, 15 L. ed. 162; *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 550; *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 767; *McGraw v. Woods*, 96 Fed. 56; *Davis v. Berry*, 106 Fed. 761; *Halsey v. Goddard*, 86 Fed. 28; *American Box Mach. Co. v. Crosman*, 57 Fed. 1025; *Caldwell v. Firth*, 91 Fed. 177). As to recover specific property, or its value (*Hubbard v. Urton*, 67 Fed. 425; *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771), or set aside fraudulent deed on two grounds (*Fisher v. Moog*, 39 Fed. 665). The double aspect is not objectionable, and it is largely discretionary with the court to permit it in the particular suit (*Chaffin v. Hull*, 39 Fed. 891), where there is no alternative prayer for inconsistent relief. Authorities above; *Shields v. Barrow*, *supra*; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 550, 551; *McGraw v. Woods*, *supra*; *Cutter v. Iowa Water Co.* 96 Fed. 777. Thus, there may be alternative grounds upon which a plaintiff may be entitled to an estate (*Halsey v. Goddard*, *supra*); such as where one claims as heir and devisee (*Stephens v. McCargo*, 9 Wheat. 502, 6 L. ed. 145; *DeForest v. Thompson*, 40 Fed. 381; *Chaffin v. Hull*, 39 Fed. 887); but the Federal court will not tolerate inconsistent grounds and prayers in the same bill (*Ritchie v. Sayers*, 100 Fed. 520; *Cutter v. Iowa Water Co.* 96 Fed. 777; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607).

To illustrate: You cannot make a case that a party has a

title, and has no title, and ask relief according to either condition. *Merriman v. Chicago & E. I. R. Co.* supra. You cannot ask that a certain agreement of compromise be set aside because induced by fraud, and have an alternative prayer for performance if not set aside. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 448. See *Hardin v. Boyd*, 113 U. S. 763, 28 L. ed. 1143, 5 Sup. Ct. Rep. 771; *McGraw v. Woods*, 93 Fed. 58. You cannot ask to set aside a release negligently executed by a trustee, and treat it as both void and valid. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* supra; *Williams v. Jackson*, 107 U. S. 484, 27 L. ed. 531, 2 Sup. Ct. Rep. 814; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 655, 656. Nor can you so treat a judgment. *Brooks v. Laurent and Cutter v. Iowa Water Co.* supra. You cannot file a bill to cancel a mortgage because the debt is illegal, and at the same time, if you are mistaken, you be allowed to redeem. *Merriman v. Chicago & E. I. R. Co.* supra; see *Rigney v. De Graw*, 100 Fed. 213.

If plaintiff is in doubt as to whether he is entitled to one kind of relief or another, he may frame a bill for relief in the alternative, and so pray, if the state of facts upon which the relief is prayed is not inconsistent. *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 742; *Ritchie v. Sayers*, 100 Fed. 536; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 5, 6, but either of the aspects must be set out distinctly in order to be cognizable in equity. *Electric Goods Mfg. Co. v. Koltonski*, 171 Fed. 553.

Sometimes the bill may have a double sound, that is, may be interpreted in two ways; in such case the defendant may elect what construction to put on it, and as he treats it plaintiff will be bound. *American Box Mach. Co. v. Crosman*, 57 Fed. 1026; *Shields v. Barrow*, 17 How. 144, 15 L. ed. 162.

### *Forms of Bills.*

I have endeavored to so discuss the "bill in equity" as clearly to suggest to one who understands the facts of his case how the bill should be drawn; if forms of bills must be referred to, they may be found in many books of forms now published.

## CHAPTER L

### DISCOVERY.

Having discussed the component parts of a bill now recognized as essential, I will briefly speak of bills of discovery. They were discussed in my lectures on Equitable Remedies, and we saw that their origin was found in a want of power in the common-law courts to compel a discovery of the truth, either through the oath of the party to the suit, or by any process of its own to compel the production of written evidence in the possession of an adverse party. *Colgate v. Compagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 84. This right to demand information only known to your antagonist in aid of your suit was permitted in equity on filing a bill for that purpose, known as bills of discovery. *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 301 and authorities cited; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 56-66; *Brown v. McDonald*, 68 L.R.A. 462, 67 C. C. A. 59, 133 Fed. 898. The ancient practice of seeking discovery was through interrogatories following the statement of your case, and this method was maintained until a comparatively recent period in the Federal courts.

In 1850 the Supreme Court, with a view of shortening the bill, promulgated equity rule 40, providing that it shall not be necessary to interrogate a defendant specially and particularly on any statement of the bill, unless the complainant desired to do so, and in case it was so desired a short form of interrogation was prescribed, cutting off much of the reiteration and prolixity that usually preceded interrogatories in the old forms. Equity rule 43 gives the form to be used. *Tillinghast v. Chace*, 121 Fed. 436, and cases cited.

In 1864 Congress passed an act embodied in section 858 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 659, providing that no witness should be excluded in

any civil action because he is a party or interested in the issue tried. This statute created a complete revolution in the common-law rules affecting the competency of parties as witnesses, and at once ended the necessity for a bill of discovery as auxiliary to a common-law suit. *Field v. Hastings & B. Co.* 65 Fed. 279.

In *United States v. McLaughlin*, 24 Fed. 825, the court says that in view of this statute it is very doubtful if a pure bill of discovery will lie at this day, and no prudent counsel will file a bill purely for discovery, or call for discovery in a bill for relief. The court gives as a reason certain disadvantages arising from it, and quotes in support of his view *Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 1204, see, also, *Brown v. McDonald*, 130 Fed. 969, and cases cited; see *Safford v. Ensign Mfg. Co.* 56 C. C. A. 630, 120 Fed. 482; *Hudson v. Wood*, 119 Fed. 764; *United States v. Bitter Root Development Co.* 66 C. C. A. 652, 133 Fed. 280 and cases cited; *Preston v. Smith*, 26 Fed. 885; *Rindskopf v. Platto*, 29 Fed. 130.

In *Colgate v. Compagnie Francaise du Telegraphe*, supra, the court says the change made in the common-law rules of evidence, permitting a party to testify in his case, does not necessitate a court of equity foregoing the exercise of its ancient jurisdiction of discovery. See *Boyer v. Keller*, 113 Fed. 580.

In *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 26, the court thinks the right of discovery by bill in equity a valuable one, and when sought by interrogatories in the bill they must be answered. *Balfour v. San Joaquin Valley Bank*, 156 Fed. 500; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 176; *Gray v. Schneider*, 119 Fed. 474.

Equity rules 41, 42, 43, and 44 are still in force, and have never been repealed or modified since section 858, United States Revised Statutes, was passed. So then, whether you seek discovery through a bill in equity in aid of a suit at law, or through interrogatories in your bill for relief, is entirely within the discretion of the pleader, which must be guided by the character of the case. *Kelley v. Boettcher*, and *McMullen Lumber Co. v. Strother*, supra; *Ryder v. Bateman*, 93 Fed. 31; *Brown v. McDonald*, 68 L.R.A. 462, 67 C. C. A. 59, 133 Fed.

898; Indianapolis Gas Co. v. Indianapolis, 90 Fed. 197; *Everson v. Equitable Life Assur. Soc.* 18 C. C. A. 251, 39 U. S. App. 34, 71 Fed. 570.

There is no question that bills purely for discovery in aid of a suit at law have fallen into innocuous desuetude, as said by Judge Brewer in *Preston v. Smith*, 26 Fed. 889; *Field v. Hastings & B. Co.* 65 Fed. 280. And it is clearly not necessary, when the purpose is to examine books as sec. 724, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 583, sec. 858, U. S. Comp. Stat. 1901, p. 659, confer authority on courts of law to require their production. *Cameron Lumber Co. v. Droney*, 132 Fed. 304; *Gray v. Schneider*, 119 Fed. 474; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175; *Ore Water Light & P. Co. v. Oroville*, 162 Fed. 975, and cases cited; *Brown v. McDonald*, *supra*. In the last case it is said the trend of the decisions even in equity is to the effect that such bills are no longer necessary in view of the act permitting parties to be witnesses. U. S. Rev. Stat. sec. 858. However, there is no question that the power to enforce discovery in equity suits is one of the original and inherent powers of a court of chancery and one that may be exercised by any party having an equitable right or equitable remedy; and it is certain that the right has not been abridged by statutory enactment or any change in the rules. Rules 40 to 44; *McMullan Lumber Co. v. Strother*, *supra*. There is often a practical advantage to be derived by an *ex parte* examination of the defendant through interrogatories in the bill, or of the complainant through interrogatories in a cross bill pertinent to the subject-matter, in developing the defense, and otherwise aiding the cause of action, and purpose of the bill. If inserted in the bill or cross bill, and the interrogatories are material, the rule requires them to be definitely and fully answered by the defendant or complainant. Equity rule 43; *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196; *Federal Mfg. & Printing Co. v. International Bank Note Co.* 119 Fed. 385; *Boyer v. Keller*, 113 Fed. 581; *Playford v. Lockhard*, 65 Fed. 870; *Kelley v. Boettcher and Oro Water, Light & P. Co. v. Oroville*, *supra*. This you may force by proper exceptions, and when definitely answered, you may be enabled to set down the case on bill and answer without further delay or expense, or you may reduce the issu-



able facts to a minimum by admissions elicited through your interrogatories in the bill, and thereby requiring but little additional evidence to be obtained by you, but prayer for discovery may be disregarded if there are no interrogatories in bill. *Excelsior Wooden Pipe Co. v. Seattle*, 55 C. C. A. 156, 117 Fed. 144; *Huntington v. Saunders*, 120 U. S. 78, 30 L. ed. 580, 7 Sup. Ct. Rep. 356. These are important considerations in view of the time and expense usually necessary in maturing an equity suit for trial on its merits.

*When Oath Waived to Answer.*

It is said that when oath is waived to the answer, the plaintiff cannot have discovery, *Tillinghast v. Chase*, 121 Fed. 435-437, and when sought in a bill, it may be disregarded, if oath waived. *Huntington v. Saunders*, 120 U. S. 80, 30 L. ed. 582, 7 Sup. Ct. Rep. 356; *Excelsior Wooden Pipe Co. v. Seattle*, supra; *McFarland v. State Sav. Bank*, 132 Fed. 401, 402. However, in a creditors' suit, where discovery is prayed in respect to defendant's indebtedness, he cannot object to making discovery though answer under oath is waived. *Hudson v. Wood*, 119 Fed. 764. So in a suit for accounting and to foreclose a lien, the fact that the bill waives an answer under oath does not waive the right to discovery. *Utah Constr. Co. v. Montana R. Co.* 145 Fed. 981-986.

S. Eq.—19.

## CHAPTER II.

### MULTIFARIOUSNESS AND MISJOINDER.

Multifariousness arises from a misjoinder of parties or causes of action. *Animarium Co. v. Neiman*, 98 Fed. 15; *Schell v. Alston Mfg. Co.* 149 Fed. 440; *King v. Inlander*, 133 Fed. 416.

It consists, first, in stating separate and distinct claims, or two or more independent causes of action, against the same defendant in the same bill; that is, the union of causes of action which, or parties whose claims, it would be impracticable and inconvenient to adjudicate in a single suit. *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 31, 32, and cases cited. See *United States v. Clark*, 129 Fed. 243. Thus, one plaintiff's suing on one or more causes of action against a part of the defendants, and another cause of action against other defendants, or several plaintiffs joining in one bill against a defendant on matters distinct and separate, would be multifarious. *Emmons v. National Mut. Bldg. & L. Asso.* 68 C. C. A. 327, 135 Fed. 689; *State Trust Co. v. Kansas City, P. & G. R. Co.* 128 Fed. 129; *Hayden v. Thompson*, 67 Fed. 273; *Church v. Citizens' Street R. Co.* 78 Fed. 529; *United States v. Guglard*, 79 Fed. 24; *Eastern Bldg. & L. Asso. v. Denton*, 13 C. C. A. 44, 31 U. S. App. 187, 65 Fed. 570; *Farson v. Sioux City*, 106 Fed. 278; *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 802; *Leslie v. Leslie*, 84 Fed. 70; *Inman v. New York Interurban Water Co.* 131 Fed. 997; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 552. So, joining an action at law against one party and a suit in equity against another in same suit is multifarious. *Thornton N. Motley Co. v. Detroit Steel & Spring Co.* 130 Fed. 396; *Walker v. Powers*, 104 U. S. 250, 26 L. ed. 731; *Coit v. Sullivan-Kelly Co.* 84 Fed. 724. So, relying upon and seeking to avoid

a decree is multifarious. *Cutter v. Iowa Water Co.* 96 Fed. 779; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 742. These are errors of frequent occurrence because of the necessity in framing a bill to seek to determine all matters between parties. The tendency is to add too many parties and join subject-matters of litigation that are distinct in their natures. Authorities above.

In *Shields v. Thomas*, 18 How. 253, 15 L. ed. 368, the court says there has been no rule of equity where less certainty of application exists, and it results from the variety and degree of interests entering into ordinary transactions.

It is said that the Supreme Court has never reversed a case for multifariousness; it is considered so much a matter of discretion in the lower court as not to be reversible on appeal. *Bracken v. Rosenthal*, 151 Fed. 136; *Ulman v. Jaeger*, 67 Fed. 985; *Emmons v. National Mut. Bldg. & L. Asso.* 68 C. C. A. 327, 135 Fed. 692; *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 652; *Harper v. Holman*, 84 Fed. 223; *Weir v. Bay State Gas Co.* 91 Fed. 940; *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.* 60 Fed. 622; it may be waived. *Chicago R. Equipment Co. v. Perryside Bearing Co.* 170 Fed. 969. The rule has been treated as one of convenience, and used to prevent parties from being harassed and vexed in litigating matters in which they have no interest, and joining parties with no interests to be litigated, and, on the other hand, to protect the complainant from having to bring several suits when one will suffice. *Animarium Co. v. Neiman*, 98 Fed. 14; *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 415, 32 L. ed. 471, 9 Sup. Ct. Rep. 127.

It is thus seen that no rule can be laid down which would determine in all cases whether the bill be multifarious or not; and I can only briefly refer to cases stating conditions under which bills have been declared multifarious.

In *Von Auw v. Chicago Toy & Fancy Goods Co.* 69 Fed. 450, the court, quoting from *Beach*, Mod. Eq. Pr. says:

First. To be multifarious two or more causes of action must be joined against two or more defendants. *Security Sav. & L. Asso. v. Buchanan*, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 802; *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403-412, 32 L. ed. 468-470, 9 Sup. Ct. Rep. 127.

Second. The causes must have no connection or common origin. *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662.

Third. Evidence supporting one cause must be wholly impertinent to the other.

Fourth. One or more of the causes must be capable of being fully determined without bringing in the other cause to adjust the equities between the parties to the bill. *Fidelity & D. Co. v. Fidelity Trust Co.* 143 Fed. 156.

Fifth. The relief in the two causes must be distinct so that the satisfaction in one would not be a satisfaction of the other. As stated in *First Nat. Bank v. Peavey*, 75 Fed. 155; *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127, the ground of the causes of action must be different, and each ground must be sufficient to support a bill. *Ziegler v. Lake Street Elev. R. Co.* 22 C. C. A. 465, 46 U. S. App. 242, 76 Fed. 662.

Mr. Heard, in his *Pleading with Precedents*, lays down the rule as follows: "Can the defendant say, I am called to answer a bill containing two distinct subject-matters, with one of which I am concerned, and there are other defendants not concerned with me in that matter." He illustrates by a bill brought against several infringers of patents, each infringer having no concern with the wrong done by others.

So, selling different lots of land out of the same tract to different individuals cannot be enforced by one bill against all the purchasers, nor can they unite in a bill to demand specific performance. *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402.

So, a bill setting up alleged liability of an assignee for unpaid stock to a corporation, and the liability of five others for colluding to defraud the creditors of the corporation, and a fraudulent sale of a railroad, is multifarious. *Holton v. Wallace*, 66 Fed. 409.

So, you cannot join an action against officers of a corporation for deceit, and against the corporation for dissolution and accounting. *Watson v. United States Sugar Refinery*, 15 C. C. A. 662, 34 U. S. App. 81, 68 Fed. 769; *Morse v. Bay State Gas Co.* 91 Fed. 944.

So, you cannot ask to enforce a trust in real estate and quiet title of one of the complainants in the property (*Leslie v. Les-*

lie, 84 Fed. 71; see *First Nat. Bank v. Peavey*, supra); but a trustee may set up a right in himself as well as trustee (*Metropolitan Trust Co. v. Columbus S. & H. R. Co.* 93 Fed. 689).

So, a suit by a stockholder, which seeks for himself to cancel stock and be relieved from the ownership, and in behalf of other stockholders to set aside fraudulent transfers of property, is multifarious. *Church v. Citizens' Street R. Co.* 78 Fed. 529; *Inman v. New York Interurban R. Co.* 131 Fed. 997.

So, where one gives to another two mortgages on separate lots, covering separate loans on each lot, and the lots have been conveyed to different persons, who are made defendants, the effort to foreclose both mortgages in one suit would be multifarious. *Eastern Bldg. & L. Asso. v. Denton*, 13 C. C. A. 44, 31 U. S. App. 187, 65 Fed. 569; see *Commercial Bank v. Sandford*, 99 Fed. 154.

So, antagonistic alternative prayers make the bill multifarious. *Cutter v. Iowa Water Co.* 96 Fed. 777; see *Halsey v. Goddard*, 86 Fed. 25. These cases in a measure illustrate the rule that joining in one bill distinct and unconnected matters against one defendant or several matters of a distinct and independent nature against several defendants, so that the parties are liable respectively, and not as connected with each other, makes the bill multifarious. *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 403, 32 L. ed. 468, 9 Sup. Ct. Rep. 127.

Then a bill to be free from this vice must relate to matters of the same nature having a connection with each other, and in which all of the defendants are more or less concerned. Thus, a cause of action against a corporation to foreclose, and one against stockholders to recover dividends because of wrongful distribution, would be multifarious if joined. *New Hampshire Sav. Bank v. Richey*, 58 C. C. A. 294, 121 Fed. 956; *Central Nat. Bank v. Fitzgerald*, 94 Fed. 16; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Hayden v. Thompson*, 67 Fed. 273. For while courts of equity are averse to a multiplicity of suits, yet they will not permit parties and causes of action to be united in one suit, where the grounds of complaint are wholly distinct and unconnected and parties have no common interest in them. *Farson v. Sioux City*, 106 Fed. 278. While multifariousness must depend on the facts of each case, and therefore must necessarily depend on the discretion of the chancellor, yet

the judicial discretion has been largely controlled by the case of *Brown v. Guarantee Trust & S. D. Co.* 128 U. S. 412, 32 L. ed. 470, 9 Sup. Ct. Rep. 127, wherein the following formula was stated:

First. The grounds of the suit must be different.

Second. Each ground must be sufficient as stated in the bill.

Third. It is not indispensable that all the parties should have an interest in all the matters contained in the suit, but will be sufficient if each party has an interest in some material matter in the suit and they are connected with the others. *Curran v. Champion*, 29 C. C. A. 26, 56 U. S. App. 383, 85 Fed. 70.

It may be said, then, that no bill is multifarious that presents a common point of litigation and the decision of which will affect the whole subject-matter and settle the rights of all parties to the suit. *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 608; *Illinois C. R. Co. v. Caffrey*, 128 Fed. 770; *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 64; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 26; *Pennsylvania Co. v. Bay*, 150 Fed. 770.

To illustrate: Two persons cannot unite distinct titles, although against the same person; but a party claiming through different titles the same property may unite the titles in the same bill. *Stephens v. McCargo*, 9 Wheat. 504, 6 L. ed. 146; *Westinghouse Air Brake Co. v. Kansas City Southern R. Co.* 71 C. C. A. 1, 137 Fed. 32, 33, reviewing cases.

The rule may be further illustrated as follows:

A claim of a minority stockholder on his own behalf and in behalf of the corporation, founded on same facts, may be joined. *Jones v. Missouri-Edison Electric Co.* 75 C. C. A. 631, 144 Fed. 767. See *Ryan v. Seaboard & R. R. Co.* 89 Fed. 397.

So, a bill for specific performance of an agreement to deliver coal for money advanced, with alternative prayer for foreclosure of a mortgage securing the loan, would not be multifarious. *Peale v. Marian Coal Co.* 172 Fed. 639.

So, a bill by a judgment creditor to subject property fraudulently conveyed, because brought against different persons hold-

ing the property by different conveyances, is not multifarious. *Fowler v. Palmer*, 87 C. C. A. 157, 160 Fed. 1; *Hultberg v. Anderson*, 170 Fed. 657; *United States v. Allen*, 171 Fed. 907.

So, a bill to require an accounting is not multifarious because of different and separate transactions set out, even though as to some of them there was a remedy at law. *United Cigarette Mach. Co. v. Wright*, 132 Fed. 195; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 296.

So, where a bill is filed against several persons involving matters of the same nature, making up a series of acts intended to defraud the complainant, in which all the defendants were concerned, is not multifarious. *Horner-Gaylord Co. v. Miller*, 147 Fed. 295; *Field v. Western Life Indemnity Co.* 166 Fed. 607; *Sipe v. Columbia Ref. Co.* 171 Fed. 295.

So, a bill filed by a receiver against a number of directors to recover money lost through misconduct is not multifarious. *Allen v. Luke*, 141 Fed. 694; *Boyd v. Schneider*, 65 C. C. A. 209, 131 Fed. 223.

So, joining two or more complainants having separate interests, but dependent on the same issues, requiring the same evidence, and leading to the same decree, is not multifarious. *Dennison Mfg. Co. v. Thomas Mfg. Co.* 94 Fed. 651; see *South Penn. Oil Co. v. Calf Creek Oil & Gas Co.* 140 Fed. 508; *Home Ins. Co. v. Virginia-Carolina Chemical Co.* 109 Fed. 682, S. C. 51 C. C. A. 21, 113 Fed. 5; *Barcus v. Gates*, 32 C. C. A. 337, 61 U. S. App. 596, 89 Fed. 783; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160.

So, a bill to enjoin diverting waters would not be multifarious because portions of the water are claimed by different rights. *Rincon Water Co. v. Anaheim Union Water Co.* 115 Fed. 544; *Pacific Live-Stock Co. v. Hanley*, 98 Fed. 327.

A bill is not multifarious because it seeks to enforce two series of bonds against a city, though to be paid for differently. *Burlington Sav. Bank v. Clinton*, 106 Fed. 270.

So, a bill to set aside a will and also a deed made by the same person, and alleged to have been procured by fraud of one of the defendants, would not be multifarious (*Williams v. Crabb*, 59 L.R.A. 425, 54 C. C. A. 213, 117 Fed. 193), provided the rights of the other defendants will not be prejudiced thereby

(Ibid.). Nor where the bill alleges the infringement of two separate patents but both being processes having a single object. *United States Mineral Wool Co. v. Manville Covering Co.* 101 Fed. 145. See "Multifariousness in Patent Cases;" *Wilkins Shoe-Button Fastener Co. v. Webb*, 89 Fed. 989; *Chisholm v. Johnson*, 106 Fed. 191.

Again, it has been held that where a person has a number of separate claims against the same party, but all arising from a common cause governed by the same law and facts, a court will entertain the bill. This is permitted to avoid a multiplicity of suits, which is a distinct ground of equitable jurisdiction. *Watson v. National Life & T. Co.* 88 C. C. A. 380, 162 Fed. 7; *Illinois C. R. Co. v. Caffrey, and Liverpool & L. & G. Ins. Co. v. Clunie*, supra; *Sang Lung v. Jackson*, 85 Fed. 502; *Louisville, N. A. & C. R. Co. v. Ohio Valley Improv. & Contr. Co.* 57 Fed. 42; *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 5; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 695. See *People's Nat. Bank v. Marye*, 107 Fed. 570; *Fitchett v. Blows*, 20 C. C. A. 286, 36 U. S. App. 597, 74 Fed. 50.

So, to establish a lien and personal indebtedness. *Ingersoll v. Coram*, 127 Fed. 418.

### *Why and How Multifariousness Should be Set Up.*

The objection of misjoinder and multifariousness, if raised and should prevail, avoids the separate proofs and pleadings rendered necessary by joining unconnected matters. Again, if not objected to, and you undertake to answer the multifarious bill, it is possible you may have one of the matters ripe for hearing and the other awaiting proofs, and at all events, you would be subjected to the delay and expense of providing proofs on unconnected matters, which a reasonable objection in time may have prevented. If you desire to raise the issue, it must be done *in limine*, by demurrer, or motion to strike out, or it is waived. *Emmons v. National Mut. Bldg. & L. Asso.* 68 C. C. A. 327, 135 Fed. 689; *McCloskey v. Barr*, 38 Fed. 166; *Fitchett v. Blows*, supra; *Converse v. Michigan Dairy Co.* 45 Fed. 18; *Ranger v. Champion Cotton-Press Co.*



52 Fed. 611; *Barney v. Latham*, 103 U. S. 215, 26 L. ed. 518; *United States v. Agee*, 47 C. C. A. 152, 108 Fed. 10.

*Form of Demurrer.*

Title as in bill, and court in which filed, as given before.

And now comes the defendant and demurs to bill herein filed, because it appears from said bill that the same is exhibited against this defendant and others (naming them) for several distinct matters and causes of action, in some of which, as appears by the bill, this defendant is in no way interested, that by thus joining the causes of action as therein contained, which are independent of each other, the proceedings will be unnecessarily intricate and prolix, and this defendant will be put to unnecessary costs in matters in which in no way relates to or concerns him.

Wherefore the defendant prays the judgment of the court whether he shall be compelled to answer further, and prays to be dismissed with his costs in this behalf incurred.

R. F.,  
Solicitor, etc.

Certificate of counsel; affidavit of defendant.

The same form is sufficient for the motion if objection is made by motion, except that you begin by, "now comes the defendant and moves the court to dismiss the bill for multifariousness, for that it appears," *etc.*

## CHAPTER LII.

### EQUITY RULES AND RULE DAYS.

We have now reached a point where the bill is prepared ready for filing, but before proceeding with the manner and effect of filing the bill, it is necessary to speak of the rules governing the preparation of a case in equity for final hearing in the Federal courts, and of the "rule days," and the purposes for which they are set apart.

From the time of filing the bill until the final hearing, every step taken is governed by rules established by the Supreme Court of the United States, as well as by the circuit and district courts; the rules established by the two last courts being only for convenience and entirely local in effect. The object and purpose of the rules thus promulgated is to speed and mature the cause for final hearing on its merits (*Allen v. New York*, 18 Blatchf. 239, 7 Fed. 483), and they must be followed (*Washington, A. & G. R. Co. v. Bradley* [*Washington, A. & G. R. Co. v. Washington*], 10 Wall. 307, 19 L. ed. 895; *Bank of United States v. White*, 8 Pet. 269, 8 L. ed. 941; *Gaines v. Relf*, 15 Pet. 9, 10 L. ed. 642), unless insistence upon them would cause great injustice. The authority to promulgate these rules is found in sec. 913 (U. S. Comp. Stat. 1901, p. 683), act of 1792, and sec. 917, act of 1842, of the United States Revised Statutes, which provides that the Supreme Court of the United States may from time to time prescribe, in any manner not inconsistent with any law of the United States, the forms of writs, etc. \* \* \* and to regulate the whole practice to be used in suits in equity. *Steam Stone Cutter Co. v. Jones*, 21 Blatchf. 138, 13 Fed. 577; *Mahr v. Union P. R. Co.* 140 Fed. 925; *Deprez v. Thomson Houston Electric Co.* 66 Fed. 23.

By section 918, U. S. Rev. Stat. it is provided that the several circuit and districts courts of the United States may, in a

manner not inconsistent with a law of the United States or with a rule of the Supreme Court, make rules and orders directing the return of writs and process, filing pleading, taking of rules, and otherwise regulate their own practice as may be convenient for the advancement of justice or prevention of delay in proceedings.

In accordance with the above provisions the Supreme Court in promulgating its rules in 1842 provided by equity rule 89 for the circuit and district judges concurring, to prescribe rules by them for their judicial districts not to be inconsistent with the rules prescribed by the Supreme Court.

Equity rule 89 was amended in 1894, and now a rule can only be adopted regulating the practice of the Federal courts of equity in any particular district by a concurrence of a majority of the judges of the circuit and the district judge of the district seeking to have the rule established, and the justice of the Supreme Court assigned to the circuit. 152 U. S. 710, 38 L. ed. 1096.

So, then, we have the equity practice in the Federal courts regulated:

First. By the laws of Congress.

Second. By the rules promulgated by the Supreme Court under the authority of Congress, now ninety-four in number.

Third. By such local rules in particular districts as have been promulgated by a majority of the judges, as provided by the act of 1894, above referred to. Rev. Stat. secs. 913-918. *Steam Stone Cutter Co. v. Jones*, supra; *Gaines v. New Orleans*, 27 Fed. 411; *Bein v. Heath*, 12 How. 178, 13 L. ed. 943; *Osborn v. Detroit*, 28 Fed. 385; *Allen v. New York*, supra; *Martindale v. Waas*, 3 McCrary, 637, 11 Fed. 551; *Northwestern Mut. L. Ins. Co. v. Keith*, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374-375.

The practice in equity, then, is regulated by the Federal judiciary, if not provided for by Congress, as experience develops necessity; and when rules are thus established, they have the full force of an act of Congress, if not in conflict with some previous law of Congress. *United States v. Barber Lumber Co.* 169 Fed. 186-187; *Northwestern Mut. L. Ins. Co. v.*

Keith, *supra*; Bryant Bros. v. Robinson, 79 C. C. A. 259, 149 Fed. 321; Bein v. Heath, *supra*.

If any question of practice should arise not provided for by these rules thus promulgated, then equity rule 90 provides that the practice in the circuit court in equity shall be regulated by the practice of the High Court of Chancery in England as far as it may be reasonably applied; not as a positive rule, but as furnishing a just analogy. Lewis v. Shainwald, 48 Fed. 492; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 646. It is, however, only the remedy that must be pursued; the equitable right must be given by local law. James v. Gray, 1 L.R.A.(N.S.) 321, 65 C. C. A. 385, 131 Fed. 409, 410.

Prior to the promulgation of the rules of practice by the Supreme Court, the practice of the High Court of Chancery of England furnished the only analogy and guide for equity procedure. National Folding Box & Paper Co. v. Dayton Paper Novelty Co. 91 Fed. 825.

Mr. Justice Bradley in Thomson v. Wooster, 114 U. S. 112, 29 L. ed. 107, 5 Sup. Ct. Rep. 788, said that the English edition of Daniel's Chancery Practice, published in 1840, contained the best exposition of the practice of the High Court of Chancery of England up to the time the equity rules were adopted in 1842. The courts have power to suspend these rules, and except a particular case from their operation if justice requires it, especially as to the time and manner of appearing and answering. Poultney v. La Fayette, 12 Pet. 475, 9 L. ed. 1162.

So much, then, for the sources of authority and effect of the equity rules. As to the history of the rules and amendments thereto see 210 U. S. beginning at p. 508.

### *Rule Days.*

The circuit courts are *always open* for the purpose of filing bills, demurrers, pleas, answers and other pleadings; also for the issuance of process and for making all interlocutory motions, orders, rules, and directions necessary to mature the case for trial on its merits. Equity rule 1. It became necessary to fix stated times when motions, rules, orders, and other pro-

ceedings, grantable of course, could be entered, as well as to fix periods controlling service and return of process, and for entry of appearance and filing responsive pleadings; so the first Monday in each month was selected as the stated time when the proceedings as above set forth could be had, and were called "rule days."

The clerk's office is open on these days, and the clerk is required to be present for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings applied for and grantable of course, which may be had by parties, or their solicitors, in all causes pending in equity in pursuance of the prescribed rules. Equity rule 2.

Equity rule 3 prescribes that any judge of the circuit court may on a rule day in term time, or in vacation at chambers, make and direct all such interlocutory orders, rules, and other proceedings, not grantable of course, preparatory to hearing all causes on their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term time, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing. U. S. Rev. Stat. sec. 638, U. S. Comp. Stat. 1901, p. 519.

Thus we see that applications may be made on rule days for all orders *grantable of course*, to the clerk of the circuit court, but for orders *not grantable of course*, application must be made to the court.

### *Orders Grantable of Course.*

Equity rule 5 provides that all motions and applications in the clerk's office for the issuing of mesne process; also final process to enforce and execute decrees; also for filing bills, answers, pleas, and demurrers; also for making amendment to bills and answers; for taking bills *pro confesso*; for filing exceptions and for other proceedings in the clerk's office, which do not by the rules established by the Supreme Court require an allowance or order of court, or any judge thereof, shall be deemed motions *grantable of course* by the clerk of the court.

Thus, then, we have set apart rule days when all these mat-

ters grantable of course by the clerk of the court must be filed and taken, and which are intended to promote the orderly conduct of procedure in an equity suit, and the more speedily bringing it to final hearing on its merits.

Special motions, rules, orders, and other proceedings not grantable of course that is, those which require the action of the court or judge under equity rule 3 may be granted by the judge at chambers, in vacation, or in term time, or on the rule days at the clerk's office, if the judge be there; but in these cases reasonable notice must be given to the adverse party, or his solicitor, if he have one, to show cause by the next succeeding rule day why the order asked for should not be granted.

The judge, however, may appoint such time to answer as he deems best, and is not bound to hearing on a rule day; however, all rules, orders, motions, or other proceedings *not grantable of course*, or without notice, shall, unless a different day be assigned by a judge, be made at the rule day next after that on which the motion is made; and it is provided by equity rule 6 that where notice of the application for matters not grantable of course has been given, and the adverse party, or his solicitor, does not appear or show good cause against the same, the motion may be heard *ex parte* by the judge, and granted or refused in his discretion.

## CHAPTER LIII.

### ORDER BOOK.

In order to keep a proper docket of all motions, orders, and other proceedings had in an equity case, and which have been made and directed on rule days, or in chambers, and grantable of course by the clerk, or by the court or a judge thereof with or without notice, the clerk of the circuit court is required to keep a book called an order book, in which every proceeding had is entered on the day when made and directed. Thus a complete history of the case is kept from its filing to its final hearing. This book is open at all hours for the inspection of parties to equity suits, or their counsel. Equity rule 4.

#### *Entry as Notice.*

These entries thus required have been given the effect of notice as follows: That except in cases where personal or other notice is not specially required or directed by the equity rules, or by a statute of the United States, or by a judge before whom the motion or application is made, then such entry of the application or motion in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, or other proceedings entered in such order book touching any and all matters in the suits to and in which they are parties and solicitors. If a rule shall require notice of any proceeding, it is essential to a hearing, and when the rule is silent as to *personal* notice, then the entry in the order book is sufficient. Notice to the solicitors is notice to the parties in all cases where personal notice to the parties is not otherwise required. The question of notice is under the complete control and discretion of the judge, both as to time, form, and manner of service.

A motion requiring no notice to the opposite party may be

presented to the judge at any time, or may be sent to the judge with the request to indorse the order granting it upon the application, but if personal notice is required, then the motion must be served on the adverse party, and then you can get the judge to indorse upon it what day it would be most convenient to hear it, and notice of the day must be given at once to the adverse party or his solicitor, and only the grounds set out in the motion will be considered. *Nevada Co. v. Farnsworth*, 89 Fed. 167.

### *Orders in Chambers.*

As seen, any judge of a circuit court may, in his circuit, either on rule days at the clerk's office, or at any time in chambers, in term time or vacation, hear any matters not grantable of course upon interlocutory motions, and grant interlocutory orders or decrees touching the preparation of a suit in equity for final hearing, or to preserve the status of the parties or subject-matter involved. Equity rule 3; U. S. Rev. Stat. Sec. 638, U. S. Comp. Stat. 1901, p. 519.

The orders in chambers may be granted on any other day than a rule day; the time of hearing the application rests entirely with the court, who may, and generally does, select a time convenient to court and counsel. If the court fixes a day other than one agreed to by counsel, it is necessary to give the adverse counsel notice of the day as fixed by the court, unless adverse counsel is present when the court indicates the day for hearing the application.

The authority of the judge at chambers is the authority of the court (*Walters v. Anglo-American Mortg. & T. Co.* 50 Fed. 317), where any order may be made in a case, except a final judgment. This practice in chambers is necessary to facilitate the trial of causes by preventing delays in obtaining orders not grantable of course, but necessary to the preparation for hearing on its merits.

### *Motions.*

We have seen that much of the preparation of a case rests upon motions to be made during its progress, so I wish to brief-



ly allude to these informal applications for some action, or order of the court deemed necessary to facilitate a hearing of the case. They must state the parties in whose favor and against whom the relief is asked, and they should state accurately the particular relief required, with a prayer for the relief as stated. They are of two kinds, *ex parte* and *on notice*, and under which class your motion falls depends upon the rules of court, and the court's discretion. While in many instances they may be verbal, where no notice to your adversary is required, yet it is best to reduce them to writing in all cases, and have the order granting them indorsed upon the motions. Whether in writing or not they must be entered in the order book in the clerk's office.

Motions as they become necessary in developing the progress of a suit in equity will be noticed, and forms from time to time given. And it will be seen that motions are only appropriate in the absence of remedy by regular pleadings (Illinois C. R. Co. v. Adams, 180 U. S. 29, 38, 45 L. ed. 410, 413, 21 Sup. Ct. Rep. 251), and should not be used to settle important questions of law or to dispose of the merits of the case. Equity rules 4, 5. Thus questions of jurisdiction should generally be raised by demurrer, plea, or answer. Scully v. Bud, 209 U. S. 486, 52 L. ed. 902, 28 Sup. Ct. Rep. 597; Desert King Min. Co. v. Wedekind, 110 Fed. 873; McKnight v. Dudley, 103 Fed. 918.

In Peacock v. United States, 60 C. C. A. 389, 125 Fed. 586, a motion to strike out portions of pleadings subject to demurrer was held appropriate but this was an action for a penalty, and would not be good practice in equity. However, when fundamental, then the issue may be raised by suggestion, verbal or written, or the court may of its own accord act. Romaine v. Union Ins. Co. 28 Fed. 633; see Interlocutory Orders, chap. 81; Buckles v. Chicago, M. & St. P. R. Co. 53 Fed. 566. When judgment on motion in the progress of a case held to be *res judicata*, and when not, see Denny v. Bennett, 128 U. S. 499, 32 L. ed. 495, 9 Sup. Ct. Rep. 134. Buckles v. Chicago, M. & St. P. R. Co. *supra*. The general rule, however is, motions are not applicable except in the absence of a remedy by regular proceeding. Virginia, T. & C. Steel & I. Co. v. Harris, 80 C. C. A. 658, 151 Fed. 435.

## CHAPTER LIV.

### FILING THE BILL AND SERVING PROCESS.

By equity rule 1 the circuit courts of the United States as courts of equity are always open for the purpose of filing bills, answers, and other pleadings, for issuing mesne and final process, and commissions to take depositions, and for making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to hearing all cases on their merits.

You may file your bill under this rule at any time in the clerk's office, and upon filing it you are entitled to the process of subpoena. By equity rule 7 the process of subpoena shall constitute the proper mesne process in all suits in equity in the first instance, to require the defendant to appear and answer the exigency of the bill. By equity rule 11 it is provided that no process of subpoena shall issue from the clerk's office until the bill is filed in said office, but by equity rule 16 it is not until the subpoena is returned served (as hereafter explained) that the clerk can enter the suit on the docket as pending in court, and the clerk shall state the time of entry. *Wheeler v. Walton & W. Co.* 65 Fed. 722; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; *United States v. Miller*, 164 Fed. 444. See *Humane Bit. Co. v. Barnet*, 117 Fed. 318, declaring that the filing of the bill is the beginning of the suit, citing *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564; *Armstrong Cork Co. v. Merchants' Refrigerating Co.* 171 Fed. 778.

### *Subpoena.*

The process of subpoena issues as a matter of course when the bill is filed in the clerk's office and not before upon the application of the plaintiff (equity rule 12), and the application is

styled the "precipe," which is in the following form and should be filed with the bill:

Title as in bill.

To the Clerk of the Circuit Court of the United States,.....District of.....

You will please issue summons for the defendant (or defendants) named in the bill returnable to the rule day in.....(state month).

R. F.,  
Solicitor, etc.

If there is more than one defendant the plaintiff may order subpœnas for each one, except in case of husband and wife, or he may order a joint subpœna for all. Equity rule 12. The plaintiff in his precipe may order the subpœna made returnable by the next rule day occurring after twenty days from the time of issuing thereof, or he may at his election order it returnable the next rule day but one, occurring after twenty days from the time of issuing the subpœna.

By the next rule day is meant the first Monday in the next month after the issuing of the subpœna, provided twenty days will have elapsed between issuing the subpœna and said first Monday. If twenty days will not elapse before the first Monday in the next month after issuing the subpœna, the next rule day will be the first Monday of the next succeeding month. Equity rule 12.

A printed form of subpœna, provided by the clerk, is issued in the name of the President of the United States, and tested as follows:

Witness the Hon.....,Chief Justice of the United States, this.....day of.....19... and in the.....year of the Independence of the United States of America.

Attest:  
[SEAL.]

R. M.,  
Clerk, etc.

U. S. Rev. Stat. Secs. 911, 912, U. S. Comp. Stat. 1901, p. 683; Middleton Paper Co. v. Rock River Paper Co. 19 Fed. 252; Chamberlain v. Mensing, 47 Fed. 436; United States v. Turner, 50 Fed. 734; Leas v. Merriman, 132 Fed. 512, and cases cited; Jewett v. Garrett, 47 Fed. 627.

Rule 12 also provides that at the bottom of the subpœna shall

be placed a memorandum by the clerk that the defendant is to enter an appearance in the suit at the clerk's office on or before the day on which the writ is returnable, otherwise the bill will be taken *pro confesso*. The memorandum follows the precipe.

By equity rule 14 if the subpoena is returnable not served, the plaintiff is entitled to another until service is had.

### *Office of Subpoena.*

We have seen by equity rule 7 that the subpoena is the proper mesne process in equity to appear and answer the exigency of the bill. Its sole office is to bring the defendant into court to give jurisdiction. *Seattle L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 179; *Wheeler v. Walton & W. Co.* supra; *Rodgers v. Pitt*, 96 Fed. 673, 674; *Wilmer v. Atlanta & R. Air-Line R. Co.* 2 Woods, 409, Fed. Cas. No. 17,775. It has no extraterritorial effect, so if issued to be served out of the district it is a nullity, unless permitted by statute, as in sections 740, 741 and 742, of U. S. Rev. Stat. U. S. Comp. Stat. 1901, pp. 587, 588, or in the act organizing the Federal district in which the suit is brought. In all of the acts of organization of these districts the territorial extent of the process is generally stated. *United States v. American Lumber Co.* 80 Fed. 311, S. C. 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; *United States ex rel. McIntosh v. Crawford*, 47 Fed. 561; *United States v. Stern*, 177 Fed. 479; *Hunter v. Russell*, 59 Fed. 966; *Kirk v. United States*, 124 Fed. 336; *Romaine v. Union Ins. Co.* 28 Fed. 625; *Galpin v. Page*, 18 Wall. 368, 21 L. ed. 963; *Treadwell v. Seymour*, 41 Fed. 580.

Sections 740, 741 and 742 have been before set forth, providing for service of process when there were several districts in one State and defendants in different districts, or when the action was local, or the land sued for lies in different districts. It was permitted in these cases to direct subpoenas to the United States marshals of the several districts in the same State. With these exceptions the subpoena cannot go beyond its district within which it is issued, and service in personal action can only be perfected upon the defendant *within* the district of the court's jurisdiction from whence the process issues. *Ableman v. Booth*, 21 How. 524, 16 L. ed. 176; *Toland v. Sprague*, 12

Pet. 328-330, 9 L. ed. 1104, 1105. If not thus served the court has no jurisdiction over the defendant unless he voluntarily appears. U. S. Rev. Stat. Sec. 739; Hardenberg v. Ray, 33 Fed. 814; Jewett v. Garrett, 47 Fed. 630.

### *Delivery to Marshal.*

The subpoena, being thus prepared, must be delivered to the United States marshal of the district where issued. Legislation does not provide how it is to be delivered, further than to harmonize with the delivery of writs of that character in the State. U. S. Rev. Stat. Sec. 911, U. S. Comp. Stat. 1901, p. 683. It is no doubt the policy of the law to keep the process of the court under the supervision and control of the court; it should therefore be delivered by the clerk to the United States marshal for service. See Jewett v. Garrett, 47 Fed. 625.

In the act reorganizing the districts of Texas, it was provided that when process was issued to defendants residing in several districts, that duplicate writs were to be indorsed by plaintiff or his attorney that such duplicates were true copies of the process sued out of the proper district. This seems to contemplate that the process was to be delivered to the plaintiff or his attorney, to be sent to the marshals of other districts, but, as stated, this practice has not been pursued in Texas. See *Ibid.*

### *Service of the Subpœna.*

Jurisdiction is only acquired by service of subpoena or voluntary appearance. Jewett v. Garrett, 47 Fed. 630; *Re Grossmayer*, 177 U. S. 50, 44 L. ed. 666, 20 Sup. Ct. Rep. 535; *Caledonian Coal Co. v. Baker*, 196 U. S. 444, 49 L. ed. 545, 25 Sup. Ct. Rep. 375, and cases cited; *Kent v. Honsinger*, 167 Fed. 625.

By equity rule 15 it is provided that the service of all mesne and final process shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process must make affidavit thereof. U. S. Rev. Stat. sec. 787, U. S. Comp. Stat. 1901, p. 608, makes

it the duty of United States marshals to serve throughout his district all lawful precepts directed to him and issued under the authority of the United States. See sec. 790, U. S. Comp. Stat. 1901, p. 609. Except when, as provided in section 922, U. S. Comp. Stat. 1901, p. 686, the marshal is a party to the suit, then the court must on application name a person to whom the process must be directed for service. But it is held in *Barnes v. Western U. Teleg. Co.* 120 Fed. 550, that if the deputy marshal serves the writ upon the marshal it is waived by appearance. See *Platt v. Manning*, 34 Fed. 817. *Jewett v. Garrett*, 47 Fed. 625.

### *Service; How Made.*

The service of subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family. Equity rule 13; *King v. Davis*, 137 Fed. 206; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 831; *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. 285, 1 Fed. 775; *Blythe v. Hinckley*, 84 Fed. 228; *Von Roy v. Blackman*, 3 Woods, 98, Fed. Cas. No. 16,997. Usual place of abode meaning present residence, and not last place of abode. *Earle v. McVeigh*, 91 U. S. 508, 23 L. ed. 400; *Swift v. Meyers*, 37 Fed. 42; *Blythe v. Hinckley*, supra. The method thus provided for the service of process must be followed in equity. State statutes have no control. *Kent v. Honsinger*, supra; U. S. Rev. Stat. sec. 914 has no application to equity. *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840. The service is governed by the judiciary acts and rule 13.

### *Service; Where Made.*

The service must be made within the district, or it is void. U. S. Rev. Stat. secs. 740, 741, 986, U. S. Comp. Stat. 1901, pp. 587, 588, 707. It has already been stated that the subpoena has no extraterritorial effect, and authorities given. See further to same effect, *Waters v. Central Trust Co.* 62 C. C.

A. 45, 126 Fed. 471; Cely v. Griffin, 113 Fed. 981; Toland v. Sprague, 12 Pet. 300, 9 L. ed. 1093. It may be served on party while in transit through district (Jewett v. Garrett, 47 Fed. 625; Holyoke & S. H. F. Ice Co. v. Ambden, 21 L.R.A. 319, 55 Fed. 593), when suit filed in plaintiff's district as provided for in act of 1888; and if not made personally must be left with an adult person who is a member of the family, or residing with the family. Von Roy v. Blackman and Phoenix Mut. L. Ins. Co. v. Wulf, supra. If a person declines to receive the paper from the officer, he may deposit it in any convenient place in the presence of the party, and the service will be good. And the service of process may be made by the marshal after removal, or an expired term. U. S. Rev. Stat. sec. 790, U. S. Comp. Stat. 1901, p. 609.

Under equity rule 13 service on the husband and wife was held good if only served on husband, but since the amended rule of 1874 it must be served on both. O'Hara v. MacConnell, supra.

#### *Service on Attorney.*

When the suit is auxiliary in its nature, as when brought to sustain an action at law or in cases of cross bills, service on attorneys who appeared for the parties in the action at law or in the original bill has been held to be valid, or then in such cases such substituted service is not allowed. Shainwald v. Davids, 69 Fed. 702, 703; Cortes Co. v. Thauhauser, 20 Blatchf. 59, 9 Fed. 227; Bowen v. Christian, 16 Fed. 729. (See "Substituted Service.") So when suit is brought to obtain a new trial at law. Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. (Milwaukee & M. R. Co. v. Soutter) 2 Wall. 633, 17 L. ed. 895; Oglesby v. Attrill, 14 Fed. 214.

#### *Service on Agent.*

Service on any agents or employees having charge or control of the inclosure of public lands of the United States will be sufficient when injunctions are sued out by the United States to restrain any violation of the laws of the United States in occupying said lands. Chap. 2 sec. 24, par. 21, New Code, effective January 1st, 1912.

*Service on Executor or Guardian.*

Service on in official capacity is sufficient as personal service. *Cornell v. Green*, 37 C. C. A. 85, 95 Fed. 334.

*Service on a State.*

When process issues against a State, the subpoena should be served on the executive and attorney general. Rule 5. Process must be directed to the State. *Florida v. Georgia*, 11 How. 293, 13 L. ed. 702; *Rhode Island v. Massachusetts*, 7 Pet. 651, 8 L. ed. 816; *New Jersey v. New York*, 3 Pet. 461, 7 L. ed. 741; S. C. 5 Pet. 289, 8 L. ed. 129.

*When Subpœna Cannot be Served.*

A defendant may be privileged from service, though within the jurisdiction of the court issuing the service; and in such cases service, if made, can be quashed on motion. *Matthews v. Puffer*, 20 Blatchf. 233, 10 Fed. 606. Thus, a party enticed into the district for the purpose of serving him cannot be legally served with process. *Re Johnson*, 167 U. S. 126, 42 L. ed. 105, 17 Sup. Ct. Rep. 735; *Steiger v. Bonn*, 4 Fed. 17; *Cavanagh v. Manhattan Transit Co.* 133 Fed. 818; *Jewett v. Garrett*, 47 Fed. 631; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 105, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. Or when attending a judicial hearing as party or witness. *Brooks v. Farwell*, 1 McCrary, 132, 2 McCrary, 220, 4 Fed. 166; *Kinne v. Lant*, 68 Fed. 436; *Kauffman v. Kennedy*, 25 Fed. 785; *Morrow v. Dudley*, 144 Fed. 441; *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 19; *Jewett v. Garrett*, supra; *Plimpton v. Winslow*, 20 Blatchf. 82, 9 Fed. 365; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582; *Hale v. Wharton*, 73 Fed. 741; but see *Iron Dyke Copper Min. Co. v. Iron Dyke R. Co.* 132 Fed. 208, for exception. The privilege is limited to a reasonable time. *Miner v. Markham*, 28 Fed. 387. And it does not apply to one voluntarily coming within the jurisdiction of the court. *Brush Creek Coal & Min. Co. v. Morgan-Gardner Electric Co.* 136 Fed. 505; *Houston v. Filer & S. Co.* 85 Fed. 758.



*Service Before Return Day.*

The writ is *functus officio* if not served before return day. *Edmonson v. Bloomshire*, 7 Wall. 310, 19 L. ed. 92. If served after return day, all proceedings thereafter, in the absence of appearance by defendant, are void. Equity rule 12; equity ruel 14.

*Effect of Valid Service.*

The jurisdiction of the Federal courts attaches when service is perfected, and not on filing bill. *United States v. Miller*, 164 Fed. 444; *United States v. American Lumber Co.* 29 C. C. A. 431, 56 U. S. App. 655, 85 Fed. 827; *Owens v. Ohio C. R. Co.* 20 Fed. 10-12; *Rodgers v. Pitt*, 96 Fed. 668-673; *United States v. Eisenbeis*, 50 C. C. A. 179, 112 Fed. 196; *Wheeler v. Walton & W. Co.* 65 Fed. 722. And this applies when the issue arises between courts of concurrent jurisdiction as to which court first took jurisdiction. *Ibid.*; and *Pitt v. Rodgers*, 43 C. C. A. 600, 104 Fed. 389. (See "Conflict between State and Federal courts.") In *Armstrong Cork Co. v. Merchants' Refrigerating Co.* 184 Fed. 200, it is said if no delay in issuing subpoena, filing the bill begins the suit.

*Return of Subpœna.*

By equity rule 12 it is provided that the subpoena shall be returnable to the clerk's office the next rule day, or the next rule day save one, as already explained.

By equity rule 16 it is provided that upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of entry. *Humane Bit Co. v. Barnet*, 117 Fed. 316.

U. S. Rev. Stat. sec. 660, U. S. Comp. Stat. 1901, p. 542, provides that no process in any circuit court shall abate or be rendered invalid by reason of any act changing the time of holding the court, but the same shall be deemed returnable to the term next after the return day thereof. The return must be made by the marshal or deputy or by the court's appointee by affidavit (*Hill v. Gordon*, 45 Fed. 278; see *United States v. Gayle*, 45 Fed. 107); and it must show that the subpoena

has been served in pursuance of the requirements of equity rule 13, as previously given.

When the service is not made by a delivery of a copy of the subpoena to the person named, but by leaving a copy at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family, the return must show that the provision of the statute was exactly pursued. *Von Roy v. Blackman*, 3 Woods, 98, Fed. Cas. No. 16,997. Thus, a return stating that a copy was delivered to an adult who was a resident of the place of abode was held insufficient. *Blythe v. Hinckley*, 84 Fed. 228; *Harris v. Hardeman*, 14 How. 334, 14 L. ed. 444; *United States v. American Bell Teleph. Co.* 29 Fed. 32. Service may be made at door outside of dwelling, not necessarily "in the dwelling." *Phoenix Mut. L. Ins. Co. v. Wulf*, 9 Biss. 285, 1 Fed. 775; *Earle v. McVeigh*, 91 U. S. 510, 23 L. ed. 401.

Defective spelling of a name in a return will not vitiate it, if it be *idem sonans*; but "Jacob Craig" and "Jacob Crug" would not be *idem sonans*. *McClaskey v. Barr*, 45 Fed. 151.

When service on executor, the service reciting served on A. B. as executor would be good individually, but not as executor. See *Cornell v. Green*, 37 C. C. A. 85, 95 Fed. 334.

A return by special deputy, not in name of the marshal, is only an irregularity. *Hill v. Gordon*, 45 Fed. 276.

The return of an officer touching any fact about which he was bound to make return is conclusive on the parties to the suit and their privies (*Von Roy v. Blackman*, supra), on collateral attack. *United States v. Gayle*, supra; see *King v. Davis*, 137 Fed. 217; *Cohen v. Portland Lodge*, No. 142, B. P. O. E. 140 Fed. 775; *Frank Parmelee Co. v. Ætna L. Ins. Co.* 92 C. C. A. 403, 166 Fed. 743; *New River Mineral Co. v. Roanoke Coal & Coke Co.* 49 C. C. A. 78, 110 Fed. 343. It is not conclusive as between strangers to the litigation. *Rigney v. Delraw*, 100 Fed. 213.

### *Motion to Quash.*

If defect is apparent, it should be met by motion to quash; if not apparent, the issue should be made by plea, and in neither case by demurrer. *Robinson v. National Stockyard Co.* 20

Blatchf. 513, 12 Fed. 361; Scott v. Stockholders Oil Co. 122 Fed. 835; United States v. American Bell Teleph. Co. 29 Fed. 17; Matthews v. Puffer, 20 Blatchf. 233, 10 Fed. 606; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398. As to the sufficiency of the plea, see Scott v. Stockholders Oil Co. 129 Fed. 615. However, the motion to quash being much the more expeditious way of settling the sufficiency of the services, the better method is to move to quash, setting up the facts that render the service bad, and supporting them by affidavits. Benton v. McIntosh, 96 Fed. 132; American Cereal Co. v. Eli Pettijohn Cereal Co. 70 Fed. 276; Wall v. Chesapeake & O. R. Co. supra.

Extrinsic evidence to impeach return of marshal good on its face will not be received where State law forbids it. Trimble v. Erie Electric Motor Co. 89 Fed. 51. All presumptions are in favor of the officer's return. New River Mineral Co. v. Roanoke Coal & Coke Co. 49 C. C. A. 78, 110 Fed. 344. And when attacked because not served in time, if the face of return shows it was served in time, it makes a prima facie case. Ibid. If motion overruled, you cannot set up facts in answer. Foye v. Guardian Printing & Pub. Co. 109 Fed. 368.

### *Amendment of Process.*

You may amend the writ of summons if it varies from the complaint, U. S. Rev. Stat. secs. 911, 948, 954, U. S. Comp. Stat. 1901, pp. 683, 695, 696; King v. Davis, 137 Fed. 209; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 616; Phoenix Mut. L. Ins. Co. v. Wulf, 9 Biss. 285, 1 Fed. 775; Norton v. Dover, 14 Fed. 106; Chamberlain v. Bittersohn, 48 Fed. 40-42; Semmes v. United States, 91 U. S. 21, 23 L. ed. 193; Gilbert v. South Carolina Interstate & W. I. Exposition Co. 113 Fed. 524; Gulf, C. & S. F. R. Co. v. James, 1 C. C. A. 53, 4 U. S. App. 19, 48 Fed. 150. As, when the writ is returnable on the wrong day. Norton v. Dover, 14 Fed. 107. Or you may amend the return of service, and that power is freely exercised in the interest of justice,—especially when the amendment will not affect the rights of third parties. Phoenix Mut. L. Ins. Co. v. Wulf, 9 Biss. 285, 1 Fed. 775, U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696, held to apply to equity procedure.

Dancel v. United States Shoe Machinery Co. 120 Fed. 837.  
You cannot, however, in case of removal from a State to a Federal court, amend the summons after removal. Hawkins v. Peirce, 79 Fed. 452; Tallman v. Baltimore & O. R. Co. 45 Fed. 156.

*When Not Allowed to Amend.*

King v. Davis, 137 Fed. 209; Dwight v. Merritt, 18 Blatchf. 305, 4 Fed. 614; Frank v. Union Cent. L. Ins. Co. 130 Fed. 225; Brown v. Pond, 5 Fed. 34; United States v. Rose, 14 Fed. 681; Hawkins v. Pierce, 79 Fed. 452.

## CHAPTER LV.

### SERVICE OF PROCESS ON CORPORATIONS.

We have seen a State may impose any condition on a foreign corporation as precedent to doing business within her limits, provided the conditions are not repugnant to the Federal Constitution and laws, or principles of natural justice. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 42, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; *Hartford F. Ins. Co. v. Perkins*, 125 Fed. 502. The State may therefore stipulate the manner and mode of service, and the person on whom, in the event of suit, service of the process can be made; and doing business in the state is considered an assent to the methods established. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Tex. Rev. Stat.* 1223; *Westinghouse Electric Mfg. Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 205.

While service from a Federal court in equity is not controlled by State statutes, yet where there is no provision on the particular case indicated by Federal law, the requirements of the State statutes will be followed if deemed reasonable. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424-434, 49 L. ed. 1111-1116, 25 Sup. Ct. Rep. 740; *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 922; *Youmans v. Minnesota Title Ins. & T. Co.* 67 Fed. 284; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 195, 37 L. ed. 700, 13 Sup. Ct. Rep. 859; *McCord Lumber Co. v. Doyle*, 38 C. C. A. 34, 97 Fed. 22; *Dinzy v. Illinois C. R. Co.* 61 Fed. 53; *St. Clair v. Cox*, 106 U. S. 359, 27 L. ed. 226, 1 Sup. Ct. Rep. 354. But this rule must

be considered in connection with the limitation of the Federal law as to place of suit. See chap. 18. *Weller v. Pennsylvania R. Co.* 113 Fed. 502; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Re Keasby*, 160 U. S. 228, 40 L. ed. 404, 16 Sup. Ct. Rep. 273; *Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526. It may be stated as a rule that Federal courts in determining the sufficiency of service follow the laws of the state. *Ibid.*; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; *Toledo Computing Scale Co. v. Computing Scale Co.* 74 C. C. A. 89, 142 Fed. 919-922; *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; *Illinois Steel Co. v. San Antonio & G. S. R. Co.* 67 Fed. 561; *Gale v. Southern Bldg. & L. Asso.* 117 Fed. 734, 735; *Van Dresser v. Oregon R. & Nav. Co.* 48 Fed. 202; *Ex Parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 146, 28 L. ed. 381, 4 Sup. Ct. Rep. 364; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 40; *Collier v. Mutual Reserve Fund Life Asso.* 119 Fed. 619; *Devere v. Delaware, L. & W. R. Co.* 60 Fed. 886; *Revans v. Southern Missouri & A. R. Co.* 114 Fed. 982; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 305, 306, 34 L. ed. 965, 966, 11 Sup. Ct. Rep. 306. They are particularly exacting with reference to corporations. *Amy v. Watertown*, 130 U. S. 316, 317, 32 L. ed. 951, 952, 9 Sup. Ct. Rep. 530.

The State of Texas provides the following laws controlling service on corporations:

Batts' Rev. Stat. 1220, provides that in suits against a county the process shall be served on the county judge of such county. *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111, 841; *Knox County v. Harsham*, 133 U. S. 152, 33 L. ed. 586, 10 Sup. Ct. Rep. 257.

Batts' Rev. Stat. 1221, provides that in suits against an incorporated town, city, or village, the process may be served on the mayor, clerk, secretary, or treasurer. *Houston v. Emery*, 76 Tex. 282, 13 S. W. 264; *Amy v. Watertown*, 130 U. S. 301, 32 L. ed. 946, 9 Sup. Ct. Rep. 530; *Stabler v. Alexandria*, 42 Fed. 490.

Batts' Rev. Stat. 1222, provides that in suits against any

incorporated company or joint stock associations the citation may be served on the president, secretary, or treasurer of such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours; and in suits against receivers of railroad companies service may be had on the general division superintendent or receiver, or upon any agent of the receiver who resides in the county in which suit is brought. This act was amended in 1905, sec. 2 of said act providing for service on foreign corporations by permitting service on train conductors and ticket agents of railroads or agents authorized to contract for transportation.

Batts' Rev. Stat. 1223, provides that in suits against any *foreign* corporation, private or public, or any joint stock association or company, citation or other process may be served on the president, vice president, secretary, treasurer or general manager, or upon any local agent of any such corporation within the State. There have also been special provisions made for service of process in suits against life and health insurance companies. *Werner Stave Co. v. Smith* (Tex. Civ. App.) 120 S. W. 247; *Cameron v. W. M. Jones & B. Mach. Works*, 41 Tex. Civ. App. 4, 90 S. W. 1129-1134; *Frick Co. v. Wright*, 23 Tex. Civ. App. 340, 55 S. W. 608; *Société Foncière v. Miliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Bay City Iron Works v. Reeves & Co.* 43 Tex. Civ. App. 254, 95 S. W. 739. The citation must be directed to the company. *Texas & M. R. Co. v. Wright* (Tex. Civ. App.) 29 S. W. 1134; *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 580, 16 S. W. 430; *Sun Mut. Ins. Co. v. Seeligson*, 59 Tex. 4. And the service must be within the State. *Louisville & N. R. Co. v. Emerson*, 43 Tex. Civ. App. 281, 94 S. W. 1105.

Batts' Rev. Stat. art. 3070, act 1885, provides that suits may be instituted and prosecuted against life and health insurance companies in any county where the loss occurred or where the policy holder instituting the suit resides, and process may be served on any person in this State holding a power of attorney from such company, and if no such person, then affidavit of the fact may be filed and process served by publication.

Batts' Rev. Stat. art. 3064, act 1874, required life and

health insurance companies to file with the commissioner of insurance under their corporate seals, powers of attorney for all of their agents, officers, and representatives in the State, authorizing them to accept service of any civil process in behalf of such company, and such service was to be held and taken as valid and all claims of error by reason of such service was waived.

Batts' Rev. Stat. art. 3090, act 1889, provides that life or casualty insurance companies or associations, organized under any of the laws of the United States outside of Texas, shall appoint the commissioner of insurance to be its true and lawful attorney, upon whom all lawful process in action or proceeding against it may be served \* \* \*.

I have thus grouped the Texas statutes providing for service on corporations, foreign or domestic, and the construction thereof, to be used as a standard of comparison with other States.

It was said above that Federal courts follow these laws in determining upon whom service is to be made, but this reservation must be added, that the party named by the State law must so far represent the company that he may be properly held an agent to receive such process in behalf of the corporation; on the theory that the relation of the person served to the company must be such as would secure knowledge of the process by the company. *Denver & R. G. R. Co. v. Roller*, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 741; *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *Strain v. Chicago Portrait Co.* 126 Fed. 832; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 195, 37 L. ed. 700, 13 Sup. Ct. Rep. 859; *Bay City Iron Works v. Reeves & Co.* 43 Tex. Civ. App. 254, 95 S. W. 739.

The term "any agent," used in State laws, may not always be followed. Thus a mere employee in the office of a local agent would not be sufficient, not holding any of the designated offices in the company. *Fearing v. Glenn*, 19 C. C. A. 388, 38 U. S. App. 424, 73 Fed. 116; *Western Cottage Piano & Organ Co. v. Anderson*, 97 Tex. 432, 79 S. W. 516. So, service on a passenger agent whose duty was only to solicit passage (*Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286;



Weller v. Pennsylvania R. Co. 113 Fed. 506; Green v. Chicago, B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; William Grace Co. v. Henry Martin Brick Mach. Mfg. Co. 98 C. C. A. 167, 174 Fed. 132; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421), or to solicit business, without power to make contracts (Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398), would not bind the corporation; but service on an agent of a foreign railroad company, who solicits business, both freight and passenger, the foreign corporation leasing lines of railway in the State, and the agent being the general manager in the State, was held good. Norton v. Atchison, T. & S. F. R. Co. 61 Fed. 618; Christie v. Davis Coal & Coke Co. 92 Fed. 4.

So service on a station agent, if permitted by statute, is sufficient to bring a foreign corporation into court. Dinzy v. Illinois C. R. Co. 61 Fed. 49.

Service on a ticket agent at union depot office was held good. Union P. R. Co. v. Novak, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573. But if service is required by law to be made on the "regular" ticket agent, it must be so made. Tallman v. Baltimore & O. R. Co. 45 Fed. 156. Service on an officer temporarily in the State was held not good. Wilkins v. Queen City Sav. Bank & T. Co. 154 Fed. 173; Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559. Nor service on a traveling salesman. McCall Co. v. Deuchler, 98 C. C. A. 169, 174 Fed. 133.

As to effect of service on a joint agent of corporations, see Mexican C. R. Co. v. Pinkney, 149 U. S. 202, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; William Grace Co. v. Henry Martin Brick Mach. Mfg. Co. 98 C. C. A. 167, 174 Fed. 132.

As to service on a general agent see Re Hohorst, 150 U. S. 663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221; Christie v. Davis Coal & Coke Co. 92 Fed. 4; Block v. Atchison, T. & S. F. R. Co. 21 Fed. 531; Denver & R. G. R. Co. v. Roller, 49 L.R.A. 77, 41 C. C. A. 22, 100 Fed. 738; Gottschalk Co. v. Distilling & Cattle Feeding Co. 50 Fed. 681; Henrietta Min. & Mill. Co. v. Johnson, 173 U. S. 221, 43 L. ed. 675, 19 Sup. Ct. Rep. 402. Or on a managing agent, see United States v. American Bell Teleph. Co. 29 Fed. 18. A "managing agent" is defined  
S. Eq.—21.

in *Atlas Glass Co. v. Ball Bros. Glass Mfg. Co.* 87 Fed. 418; *St. Clair v. Cox*, 106 U. S. 357, 27 L. ed. 225, 1 Sup. Ct. Rep. 354; *Houston v. Filver & S. Co.* 85 Fed. 757; *Denver & R. G. R. Co. v. Roller*, *supra*; *Union Associated Press Co. v. Times-Star Co.* 84 Fed. 419.

If the State statute provides that it may be served on certain persons, if the officers are not found in the county, then the return must show in the Federal court that the officers could not be found in the *district*, if served upon persons named in the statute. *Miller v. Norfolk & W. R. Co.* 41 Fed. 431; *Amy v. Watertown*, 130 U. S. 316, 317, 32 L. ed. 951, 952, 9 Sup. Ct. Rep. 530; *Collins v. American Spirit Mfg. Co.* 96 Fed. 133; *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156.

### *Doing Business.*

We have thus seen who may be served to bring a foreign or domestic corporation into a Federal court; but there is another consideration, in case of foreign corporations, to which your attention must be called, before service on the parties named can bind the foreign corporation, so as to bring it within the jurisdiction of a Federal court in a State other than the State of its incorporation.

The general rule is that legal service of process issuing from the Federal courts can only be had on a foreign corporation in the State of its incorporation, when it is *doing business* in the State where sued and in the Federal district of which plaintiff is a resident citizen, and this must be shown somewhere in the record. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Jackson v. Delaware River Amusement Co.* 131 Fed. 134; *Swann v. Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Earle v. Chesapeake & O. R. Co.* 127 Fed. 237; *Tierney v. Helvetia Swiss F. Ins. Co.* 163 Fed. 83; *Westinghouse Mach. Co. v. Press Pub. Co.* 110 Fed. 254; *Conley v. Mathieson Alkali Works*, 110 Fed. 730; *Eldred v. American Palace Car Co.* 45 C. C. A. 1, 105 Fed. 455; *Goldey v. Morning News*, *supra*; *Central Grain & Stock Exchange v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 463, 464; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 603, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Buffalo Glass Co. v. Manufacturers' Glass Co.*

142 Fed. 273. And the business must warrant the inference that the corporation is there present through its agent. *Green v. Chicago, B. & Q. R. Co.* supra; *Norton v. W. H. Thomas & Sons Co.* (Tex. Civ. App.) 93 S. W. 711. That is; plaintiff may only sue a foreign corporation in his own residence district, if it is doing business there, and only on those conditions can valid service be made on the persons named to bind the corporation. *Ibid.*

I have already discussed what is meant by the words "doing business," to which reference is made, and a foreign corporation to obtain valid service upon it must (Chap. 19)—

First. Be *doing business* in the State and district where sued; *Central Grain & Stock Exchange v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 464, which is a question of general, not local law. *Frawley v. Pennsylvania Casualty Co.* 124 Fed. 259; *West v. Cincinnati, N. O. & T. P. R. Co.* 170 Fed. 349; *Wange v. Public Service R. Co.* 159 Fed. 190.

Second. It must be the State and district where the plaintiff resides. *Ibid.*

Third. The service must be on some agent or officer representing it there.

Fourth. Must be local law making it amenable to suit there as a precedent to doing business. *Mecke v. Valley Town Mineral Co.* 89 Fed. 114; *United States v. American Bell Teleph. Co.* 21 Fed. 17.

So, when business ceases, the right to serve ceases. *De-Castro v. Compagnie Francaise Du Telegraphe*, 76 Fed. 426; *Friedman v. Empire L. Ins. Co.* 101 Fed. 535; *Forrest v. Pittsburgh Bridge Co.* 53 C. C. A. 577, 116 Fed. 357.

So, when a license is revoked, the right to service ceases. *Swann v. Mutual Reserve Fund Life Asso.* supra.

However, a withdrawal from the State would not have that effect as long as outstanding business remains upon which money is collected or paid. *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 610, 43 L. ed. 571, 19 Sup. Ct. Rep. 308. If not doing business, the officers temporarily or casually in a State cannot be served. *Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co.* 141 Fed. 211; *Honeyman v. Colorado Fuel & I. Co.* 133 Fed. 96; *Johnson v. Computing Scale Co.* 139 Fed. 339; *Eirich v. Donnelly Contracting Co.*

104 Fed. 1; *Mecke v. Valletown Mineral Co.* 35 C. C. A. 151, 93 Fed. 697; *United States Graphite Co. v. Pacific Graphite Co.* 68 Fed. 442; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 137; *Goldey v. Morning News*, 156 U. S. 522, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 111, 42 L. ed. 968, 18 Sup. Ct. Rep. 526; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 99, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. But when doing business, then service on a resident director of a foreign corporation is good (*Meyer v. Pennsylvania Lumbermen's Mut. F. Ins. Co.* 108 Fed. 170); or service on the head of a firm, agent of a foreign corporation, is good (*Re Hohorst*, 150 U. S. 663, 37 L. ed. 1215, 14 Sup. Ct. Rep. 221); or service on persons named by State statutes: but either the return or the record must show that at the time of service the corporation was doing business in the State and district where served. *Central Grain & Stock Exchange v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 463, 464, and authorities cited.

## CHAPTER LVI.

### APPEARANCE.

After the service has been made and the writ returned, the defendant in person or by counsel must enter an appearance, either special or general. Equity rule 17. This rule provides, first, that the appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided the process has been served twenty full days before that day, otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. Second. The appearance of the defendant, either personally or by solicitor, shall be entered in the order book on the day thereof by the clerk.

U. S. Rev. Stat. sec. 747, U. S. Comp. Stat. 1901, p. 590, provides that all parties may manage their own case, personally or by counsel, so the entry may be by the defendant personally or by his solicitor, and may be made as follows:

Title as in bill.

To the Clerk of the Circuit Court of the United States:

Please enter the appearance of C. D., the defendant in the above cause, and of myself as solicitor, as of the date of the filing hereof.

R. F.,  
Solicitor.

Or enter the appearance of myself, etc.

(Signed) C. D.,  
Defendant.

Romaine v. Union Ins. Co. 28 Fed. 630-638.

Should there be more than one defendant and you represent all, name them in your notice of appearance; if you only represent some of them, name those you represent.

Ordinarily in the equity system an appearance is evidenced by some character of pleading, but in the Federal system a

formal entry of appearance is demanded before any defense is required. *Romaine v. Union Ins. Co.* 28 Fed. 631; equity rules 12, 17, 18; see *Heyman v. Uhlman*, 34 Fed. 686.

While the above is the method of entering an appearance, yet many privileges are waived by entering a general appearance, so you should be careful in taking this first step. *Whitcomb v. Hooper*, 27 C. C. A. 19, 53 U. S. App. 410, 81 Fed. 946; *Crawford v. Fosters*, 2 C. C. A. 576, 56 U. S. App. 231, 84 Fed. 939.

If you wish to object to some defect in the subpoena when tested by the statute; or some irregularity in the service; or to deny any service; or some irregularity or insufficiency in the return of the subpoena; or that it is untrue in fact; or that you were not amendable to service; or desire to claim the privilege of being sued in your own district,—then you must enter only a special appearance (*Barnes v. Western U. Teleg. Co.* 120 Fed. 556; *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Lung Chung v. Northern P. R. Co.* 10 Sawy. 17, 19 Fed. 254; *Ellsworth Trust Co. v. Parramore*, 48 C. C. A. 132, 108 Fed. 906); as a general appearance would waive all irregularities of process, as well as the privilege of being sued in the district of your residence (*Creighton v. Kerr*, 20 Wall. 12, 22 L. ed. 310; *Whitcomb v. Hooper*, 27 C. C. A. 19, 53 U. S. App. 410, 81 Fed. 946; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Harkness v. Hyde*, 98 U. S. 479, 25 L. ed. 238; *German Ins. Co. v. Frederick*, 7 C. C. A. 122, 19 U. S. App. 24, 58 Fed. 147; *Foote v. Massachusetts Ben. Asso.* 39 Fed. 24; *Jones v. Andrews*, 10 Wall. 327, 19 L. ed. 935; *Rhode Island v. Massachusetts*, 12 Pet. 719, 9 L. ed. 1258; *Platt v. Manning*, 34 Fed. 817) unless objection has been made and overruled before answering to the merits (*Donahue v. Calumet Fire Clay Co.* 94 Fed. 27, and cases cited; *Baumgardner v. Bono Fertilizer Co.* 58 Fed. 4; *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 844); and removal after entry of special appearance is not such general appearance as would bar the special appearance (*Morris v. Graham*, 51 Fed. 53; *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44). You cannot set up the objection by plea, as there is no

such thing in equity as a plea to the writ. *Romaine v. Union Ins. Co.* 28 Fed. 627. Motion to quash, supported by affidavit, if not apparent, is the proper practice. *Ibid.*; *Robinson v. National Stock-Yard Co.* 20 Blatchf. 513, 12 Fed. 361; *Bostwick v. American Finance Co.* 43 Fed. 897; *Benton v. McIntosh*, 96 Fed. 132; *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398; *Forrest v. Pittsburgh Bridge Co.* 53 C. C. A. 577, 116 Fed. 358; *United States v. American Bell Teleph. Co.* 29 Fed. 17; *American Cereal Co. v. Eli Petti-john Cereal Co.* 70 Fed. 276.

### *Entering Special Appearance.*

Much discussion has arisen as to the proper practice in entering special appearance so as to avoid the waiver of objections to the writ, its service, or return, or venue.

In *Romaine v. Union Ins. Co.* 28 Fed. 626, it was argued with much force that the English practice should be followed in the absence of a definite rule. The English practice required a motion and an order to be obtained to enter a special appearance, with an undertaking to submit to the further order of the court, if the objection to the writ was not sustained, and then to move the court to discharge the service, but upon examination of the practice I find the following procedure and form is sufficient. Prepare and file the following direction to the clerk:

Title as in bill.

To the Clerk of the Circuit Court of the United States, at.....:

Please enter my appearance as defendant (or the appearance of..... defendants, and of myself as their solicitor) *specially*, and for the sole purpose of objecting to the jurisdiction of this court to compel the defendants to appear and answer (because of the return of the United States marshal upon the subpoena issued in this cause, stating defect) or (the invalidity of the subpoena, stating wherein it does not comply with the statute) or (because of improper service, stating the defect) or (because defendant was served out of his district, or is not a resident citizen of the district in which suit is brought) or (whatever the cause of objection may be). So far as the same relates (to myself) to the said defendants above named, and for no other purpose, and I file herewith a motion to set aside the said subpoena or service.

R. F.,  
Solicitor, etc.

Romaine v. Union Ins. Co. 28 Fed. 626; United States v. American Bell Teleph. Co. 29 Fed. 21-28.

See Ellsworth Trust Co. v. Parramore, 48 C. C. A. 132, 108 Fed. 907, for form if objection is that it is not brought in the district of defendant's residence and citizenship.

This notice of special appearance is entered by the clerk in the order book.

The notice should be accompanied by a motion to quash the writ or service, or to dismiss the suit, as the case may be, but you may wait until the rule day after entering your special appearance, then file the motion to quash the writ, or service, or to dismiss the case, as when you set up your privilege to be sued in your residence district. Romaine v. Union Ins. Co. 28 Fed. 625-638. The motion to quash, etc., may be as follows:

Title as in bill.

And now comes the defendant by his solicitor (or by himself), appearing specially for the purpose herein set forth and no other, and moves the court to quash the writ of subpœna (or service or whatever the cause) issued herein, so far as the same relates to the defendant (naming him or myself) because said subpœna is invalid (or service defective, or return untrue, or served out of his district, but whatever the ground state specifically and then proceed), and for the reasons set forth above to vacate and hold the same for naught; and defendant prays the judgment of this court whether he shall be compelled to appear herein or answer thereto because of the many defects in the process and return as above set forth by reason of which no legal service has been had, nor has defendant accepted service herein, nor has he (or they) voluntarily appeared, nor has he (or they) waived due service of process upon him (or them).

United States v. American Bell Teleph. Co. 29 Fed. 17-28.

When the subpœna and service is regular, but the objection is that defendant is sued out of his residence district, and he wishes to claim his privilege to be sued in his own Federal district, the following form of motion may be used:

Title as in bill; commencement as above, and proceed:

Says he is not a citizen or inhabitant of, nor does he reside in, the..... district of ....., but that he is an inhabitant of and resides in the county of....., which is in the.....district of....., which said district has jurisdiction of this defendant and not the.....district in which this suit is brought (deny acceptance of service, or waiver of it, or voluntary appearance as in above form). Wherefore defendant C. D. pleads his exemption to be used in this Federal district and says he is



only subject to the jurisdiction of the Circuit Court of the United States for the .....District of....., and prays to be dismissed hence with his reasonable costs in this behalf incurred.

R. F.,  
Solicitor, etc.

See *Romaine v. Union Ins. Co.* 28 Fed. 626.

Be careful that your motion goes no further than the special objection to the writ, or its service and return, or to the personal privilege claimed; for should you set up in your motion want of equity in the bill or any other affirmative matter of defense, it would destroy the effect of your special appearance, and hold you in court. *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Crawford v. Foster*, 28 C. C. A. 576, 56 U. S. App. 231, 84 Fed. 939; *Jones v. Andrews*, 10 Wall. 332, 333, 19 L. ed. 936; *Edgell v. Felder*, 28 C. C. A. 382, 52 U. S. App. 417, 84 Fed. 69. You will find that the Federal courts have been liberal in permitting the special appearance to attack irregularities of service or want of jurisdiction (*Romaine v. Union Ins. Co.* 28 Fed. 626-636; *Harkness v. Hyde*, 98 U. S. 479, 25 L. ed. 238; *Lung Chung v. Northern P. R. Co.* 19 Fed. 256; *Forrest v. Union P. R. Co.* 47 Fed. 2); and it seems that the fact the defendant accepted service outside of his district would not prevent him from specially appearing and moving to dismiss, because not brought in his district (*Butterworth v. Hill*, 114 U. S. 133, 29 L. ed. 120, 5 Sup. Ct. Rep. 796; *United States v. Loughrey*, 43 Fed. 449; *Graham v. Spencer*, 14 Fed. 605, 606).

If the invalidity, irregularity, or defects claimed in the motion are apparent, the court will act at once, but if issues of fact are involved in the motion, and not admitted, then the motion should be supported by affidavits to which plaintiff may reply, which issue the court can set for hearing and hear in such manner as he may deem proper to expedite the cause.

### *Objections to Service.*

I will briefly illustrate these objections to service, and raising the issue by motion to quash. Where the party served was not agent as alleged in return should be raised by motion to quash after entering a special appearance for that purpose.

American Cereal Co. v. Eli Pettijohn Cereal Co. 70 Fed. 276; United States v. American Bell Teleph. Co. 29 Fed. 18; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. R. Co. 4 C. C. A. 403, 9 U. S. App. 212, 54 Fed. 421; Jackson v. Delaware River Amusement Co. 131 Fed. 134; Collins v. American Spirit Mfg. Co. 96 Fed. 133.

There is an apparent conflict of authority as to whether the issue should be raised by plea in abatement or by motion to quash, but I think this conflict only appears in cases at law, and upon the question as to whether the statute of the State in which the court is sitting should control the practice. Thus in Rubel v. Beaver Falls Cutlery Co. 22 Fed. 282, following the statute of Illinois, it was held the issue could only be raised by plea, and not by motion. So in Forrest v. Union P. R. Co. 47 Fed. 2; Union P. R. Co. v. Novak, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 578, the same ruling was made. While in Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 401, which was also a case at law, it was held that the method of raising the issue of proper service, etc., was not within the act of conformity. U. S. Rev. Stat. sec. 914, U. S. Comp. Stat. 1901, p. 684; Benton v. McIntosh, 96 Fed. 132. Whatever may be the rule at law, I think it may be stated that a motion supported by affidavits if not apparent is the proper practice in equity to set aside the service. See authorities cited above.

In Texas a special appearance for objecting to the service of process is equivalent to entering a general appearance, except that such special appearance continues the case for the term. Westinghouse Electric Mfg. Co. v. Troell, 30 Tex. Civ. App. 200, 70 S. W. 325 and cases cited; Seley v. Parker (Tex. Civ. App.) 45 S. W. 1026; Edinburgh American Land Mortg. Co. v. Briggs (Tex. Civ. App.) 41 S. W. 1036. This rule has been rejected by the Federal courts. Mexican C. R. Co. v. Pinkney, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; Southern P. Co. v. Denton, 146 U. S. 209, 36 L. ed. 945, 13 Sup. Ct. Rep. 44; O'Connell v. Reed, 5 C. C. A. 586, 12 U. S. App. 369, 56 Fed. 538. Equity rules 18 and 19. Nor do the Federal courts follow the State courts in trying the suf-

iciency of service, and so in Federal courts legality of service is not waived by special appearance to set it aside, nor even after such motion has been denied will it be waived by answering to the merits, for it may be reviewed on appeal. *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 398; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. ed. 705, 13 Sup. Ct. Rep. 859; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Ellsworth Trust Co. v. Parramore*, 48 C. C. A. 132, 108 Fed. 906. Nor does a special appearance for petition to remove waive objection to service. *Clews v. Woodstock Ins. Co.* 44 Fed. 31; *Morris v. Graham*, 51 Fed. 53; *Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 942, 13 Sup. Ct. Rep. 44; *Goldey v. Morning News*, 156 U. S. 522, 523, 39 L. ed. 518, 519, 15 Sup. Ct. Rep. 559; *Reifsnider v. American Imp. Pub. Co.* 45 Fed. 433; *Wabash Western R. Co. v. Brow*, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126; *Kinne v. Lant*, 68 Fed. 436; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 26; *Collins v. American Spirit Mfg. Co.* 96 Fed. 133; *Mecke v. Valley Town Mineral Co.* 89 Fed. 114; *Sharkey v. Indiana D. & W. R. Co.* 186 U. S. 479, 46 L. ed. 1266, 22 Sup. Ct. Rep. 941.

## CHAPTER LVII.

### GENERAL APPEARANCE.

Having seen how a general appearance is entered, its effect, as said, is to waive all questions of irregularities of process as well as the privileges of venue. See authorities cited in chap. 56; *Fosha v. Western U. Teleg. Co.* 114 Fed. 702; *Callahan v. Hicks*, 90 Fed. 539; *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 822; *Scott v. Hoover*, 99 Fed. 250; *Whitcomb v. Hooper*, 27 C. C. A. 19, 53 U. S. App. 410, 81 Fed. 946; *Creighton v. Kerr*, 20 Wall. 8-12, 22 L. ed. 309, 310; *Seattle, L. S. & E. R. Co. v. Union Trust Co.* 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 187; *Eddy v. Lafayette*, 1 C. C. A. 441, 4 U. S. App. 247, 49 Fed. 809; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982. Again, it converts a suit *in rem* into a personal suit. *Beamer v. Werner*, 159 Fed. 101; *L'Engle v. Gates*, 74 Fed. 515.

Of course it does not waive matters touching the fundamental jurisdiction of the court, as want of diversity of citizenship, or the absence of a Federal question, or the insufficiency of amount, as these defects can be raised at any time during the progress of the cause, as we have seen, by demurrer, plea, or suggestion. They go to the power of the court, whereas the matters waived by general appearance or exercised by consent are but the means whereby the power is exercised. *Ibid.*; *Lockett v. Rumbaugh*, 45 Fed. 31; *Fales v. Chicago, M. & St. P. R. Co.* 32 Fed. 673; *Rodgers v. Pitt*, 96 Fed. 676; *Re Stutsman County*, 88 Fed. 341, 342; *Duncan v. Associated Press*, 81 Fed. 417; *Central Trust Co. v. Virginia, T. & C. Steel & I. Co.* 55 Fed. 769; *McBride v. Grand de Tour Plow Co.* 40 Fed. 162; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Less v. English*, 29 C. C. A. 275, 56 U. S. App. 16, 85 Fed. 477, 478.

A general appearance is sometimes entered without authority, and if so a defendant may appear and explain, by setting up and showing his solicitor had no authority to do so, and that

his employment was to object to the validity of process or claim the privilege of venue. *Shelton v. Tiffin*, 6 How. 163, 12 L. ed. 387; *Graham v. Spencer*, 14 Fed. 603; *Jenkins v. York Cliffs Imp. Co.* 110 Fed. 807.

Again, a general appearance may be withdrawn (*Creighton v. Kerr*, 20 Wall. 8-13, 22 L. ed. 309-311); but a withdrawal without leave of court, or by leave and "without prejudice to plaintiff," leaves the record in a condition to take judgment by default for want of appearance (*Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 606, 43 L. ed. 1104, 19 Sup. Ct. Rep. 761; *First Nat. Bank v. Cunningham*, 48 Fed. 517); or the court may proceed as if the defendant was still in its presence (*Graham v. Spencer*, 14 Fed. 607).

So when a defendant has filed a plea to the merits, a withdrawal of the plea does not affect the general appearance (*Eldred v. Michigan Ins. Bank*, 17 Wall. 551, 21 L. ed. 686; *Habich v. Folger*, 20 Wall. 1-8, 22 L. ed. 307-309); but withdrawing both plea and general appearance, and defendant has not been served with process, then the court cannot proceed (*Graham v. Spencer*, 14 Fed. 606, 607).

Filing any character of defensive pleading is equivalent to a general appearance. *Central Trust Co. v. McGeorge*, 151 U. S. 133, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; *Scott v. Hoover*, 99 Fed. 250; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; *Barnes v. Western U. Teleg. Co.* 120 Fed. 555; *Lowry v. Tile, Mantel & Grate Asso.* 98 Fed. 823; *Carter-Crume Co. v. Peurrung*, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 442; *Southern Exp. Co. v. Todd*, 5 C. C. A. 432, 12 U. S. App. 351, 56 Fed. 108; *Frisbie v. Chesapeake & O. R. Co.* 57 Fed. 2. Except when want of jurisdiction is apparent and met by special demurrer (*Southern P. Co. v. Denton*, 146 U. S. 206, 36 L. ed. 945, 13 Sup. Ct. Rep. 44); and except, as we have seen, where an answer after objection to the jurisdiction has been overruled (*Ibid.*; *Harkness v. Hyde*, 98 U. S. 476-479, 25 L. ed. 237, 238).

### *Substituted Service.*

There is a service of process known as substituted service, which will be discussed under "Auxiliary Proceedings."

## CHAPTER LVIII.

### SECTION 8, ACT 1875.

What has been said about process has referred to the process of subpoena and its limited scope within the district of suit, and those cases where it could reach beyond to other districts in the same State. *Cely v. Griffin*, 113 Fed. 981. I now propose to discuss section 8 of the act of March 3, 1875.

This section was passed in 1872 (U. S. Rev. Stats.) but was enlarged in 1875 and specially retained in the act of 1888 by section 5 of that act. *American F. L. M. Co. v. Benson*, 33 Fed. 456. The act did not enlarge the jurisdiction of the court, but gave greater scope to its process, and was of great importance, as it gave, for the first time in the history of the Federal system, the power and authority to reach nonresidents claiming an interest or right in and to property within the jurisdiction of the court. Special process was provided by this section to be sent beyond the limits of the State, and to require nonresidents to appear and answer. *Goddard v. Mailler*, 80 Fed. 423; *United States v. American Lumber Co.* 80 Fed. 313. I have heretofore alluded to this act in its relation to venue of suits, but I will now discuss it as an additional process, and give forms for its use. The act is as follows:

“When in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance, or lien, or cloud upon the title to real or personal property within the district where the suit is brought, one or more of the defendants shall not be an inhabitant of or found within the district, or shall not voluntarily appear thereto; it shall be lawful for the court to make an *order*, directing such defendants to appear, plead, answer, or demur, by a day certain, to be designated, which order shall be served on such absent defendants if practicable, wherever found, and also on the person or persons in possession or charge of said property, if any there be; or, when such personal service is

not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six successive weeks, and in case such absent defendant shall not appear and plead, answer, or demur within the time limited or within such further time as may be allowed by the court in its discretion, and on proof of the service or publication of such order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of said suit in the same manner as if the absent defendants had been served with process in the said district, but such adjudication shall as regards such absent defendant without appearance affect only the property which shall have been subject to the suit and under the jurisdiction of the court therein within such district, and when a part of such property shall be within another district of the same State, the suit may be brought in either district. Provided that the defendant or defendants not personally notified may, upon entering his appearance within one year from the judgment, obtain an order setting aside the judgment and permitting him to defend on the payment of costs." U. S. Rev. Stat. sec. 738.

The special retention of this act in the act of 1888 was congressional recognition of the right of service personally or by publication, where title, claim, or encumbrance in, to, and upon property located in the district of suit was involved (*Morris v. Graham*, 51 Fed. 56, 57), and whether the suit be in law or equity. *Shainwald v. Lewis*, 6 Sawy. 585, 5 Fed. 517; *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 158; *Merrihew v. Fort*, 98 Fed. 899; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 515. A strict compliance with its provisions is exacted by the courts. *Jennings v. Johnson*, 78 C. C. A. 329, 148 Fed. 337; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 705; *Batt v. Procter*, 45 Fed. 515; *Gage v. Riverside Trust Co.* 156 Fed. 1002; *Jones v. Gould*, 141 Fed. 698; *Bracken v. Union P. R. Co.* 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 447. The notice must be one authorized by law, or it is void. *United States v. American Lumber Co.* 80 Fed. 313; *Kent v. Honsinger*, 167 Fed. 627.

See sec. 57, chap. 4, New Code, embodying sec. 8 of the act of 1875, and the practice thereunder.

*Warning Order.*

The order issued by the court requiring the appearance of the absent defendant to plead, answer, or demur is called the "warning order," and must be personally served unless impracticable, and this must be shown before publication is authorized. *Batt v. Procter*, 45 Fed. 516, 517; *Jennings v. Johnson*, 78 C. C. A. 329, 148 Fed. 337; *Forsyth v. Pierson*, 9 Fed. 801.

The essential difference between a "warning order" and a subpoena is that the subpoena issues as of course, but has no force beyond the district of suit, unless otherwise provided by statute, as before stated, while the warning order can only issue upon application to the court, and only in cases covered by the statute (*United States v. American Lumber Co.* 80 Fed. 313); and may be directed wherever the nonresident can be found. It is not necessary to issue a subpoena and return "not found" as a basis for the warning order (*Forsyth v. Pierson*, 9 Fed. 801; *Batt v. Procter*, 45 Fed. 515), although this has been intimated in *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928; and see *United States v. American Lumber Co.* 80 Fed. 314.

The allegation of the bill as to nonresidence is a sufficient predicate upon which to make the application to the court for a warning order or special order of service (*United States v. American Lumber Co.* 80 Fed. 309; *Mercantile Trust Co. v. Portland & O. R. Co.* 10 Fed. 605, note; *Woods v. Woodson*, 40 C. C. A. 525, 100 Fed. 515; *Batt v. Procter*, 45 Fed. 516); but not when affidavit as to nonresidence made four months before application. *Spreen v. Delsignore*, 94 Fed. 71. The proper practice is to apply for the order of service as the first process, if the allegations of your bill as to the nonresidence of the defendant sought to be served are sufficient, and your cause of action falls within the provisions of the statute, but if the nonresidence of the defendant sought to be served is not shown in the bill, then subpoenas may be issued, and upon a return "not found" you may predicate an application for the "warning order." The forms to be used are as follows:

A. B. }		In United States Circuit Court for
vs. }	In Equity.	the.....District of.....
C. D. }		sitting at .....



Now comes A. B., plaintiff in the above cause, and shows to the court that on the..... day of..... A. D. 19.., he commenced suit in this court, the same being a bill to remove cloud, etc. (or an action to try title; or any of the causes mentioned in section of the act authorizing the service) as is shown by the bill (or petition, if at common law) filed in the said court to enforce his equitable (or legal) right to certain real estate therein described (or personal property therein set forth), lying and being situated in the county of.....in the.....district of the State of ....., and which real estate (or personal property) is therein described as part of the..... (if land here describe as in petition), against C. D., defendant, the said C. D. being citizen of.....(or can be found in.....), the State of.....of the United States of America. That said C. D. resides in (or can be found in).....county, in the said State of..... (State as particularly as you can the residence of the nonresident or where he can be found, as the warning order must be addressed to the United States marshal of the Federal district of the residence, or the Federal district of the State, where the nonresident can be found.)

Plaintiff further shows that he is a resident citizen and an inhabitant of the State of..... (or that he is a citizen of the State of ..... and a resident and inhabitant of the..... district of said State). That the said defendant is not to be found within the State of..... where the suit is brought, nor has he voluntarily appeared to answer, plead or demur to the bill filed by plaintiff.

Wherefore plaintiff moves the court that its order be granted, entered and served as provided by law, directing the defendant to appear and answer, plead or demur in said cause by a day certain to be designated by this court.

R. F.,  
Solicitor, etc.

If there be several nonresident defendants, the specific residence or place where to be found must be stated as to each.

If the defendant be a corporation, then say:

And the....., a corporation created, organized and existing under the laws of the State of....., of which said corporation one M..... is president, who is a citizen of (or can be found in) the State or..... and one N..... is secretary, who is a citizen or (or can be found in) the State of....., and that the said corporation and the said M..... and the said N..... are all residents and inhabitants of (or can be found in) the county of..... in the State of....., etc.

There is nothing in the act requiring the motion or application to be sworn to, but in *Forsyth v. Pierson*, 9 Fed. 803, it is intimated that it should be supported by affidavit as to the  
S. Eq.—22.

truth of the allegations made. *Woods v. Woodson*, 40 C. C. A. 565, 100 Fed. 518.

With the motion prepare and present an order as follows:

Title and commencement as in motion.

On this day at the..... division of the Circuit Court of the United States in and for the..... district of....., came on to be heard the application of A. B., plaintiff in the above styled and numbered cause, for an order directing the absent defendant C. D. (or defendants C. D. and E. F., or....., a corporation, etc., describe as in motion, stating president and secretary, etc.) to appear and plead, answer or demur herein by a day certain to be designated by the court. And it appearing to the court that this suit is commenced by plaintiff, who is a resident citizen and inhabitant of the State of..... (or of..... as stated in the motion), to enforce an equitable (or legal, if at law) claim to land situated in the county of....., in the State of ....., being in the .....district of said State, the said suit being to remove cloud (or whatever it may be) and the said C. D., defendant therein named, is not an inhabitant of the said.....district of ....., nor is he to be found in said State and has not voluntarily appeared in said suit.

And the court being of opinion that said application should be granted, it is ordered that the said C. D., defendant, shall appear, plead, answer or demur to the bill (or petition) of plaintiff on or before the.....day of.....A. D. 19.., the same being the first Monday (or whatever day it may be in the term) at the next term of this court (or the term now in session) at the court room thereof in the city of....., in the county of....., in the State of .....

That certified copies of this order and plaintiff's bill (or petition) be served on the said C. D. .... days before the date above named and that service be made on said defendant C. D. by the United States marshal for the.....District of the State of.....

This order should always be obtained in open court, and should the suit be pending in one division of a district, you may apply to the court in session in any other division of the district, for the order. If you should apply out of the division of the district where the suit is pending, you should add to the order granted by the court the following:

It is further ordered that the clerk of this court enter this order of record and certify the same to the.....division at.....for record and observance.

Done in open court in the city of....., in the State of....., this the.....day of.....A. D. 19...

I. M.,  
United States Judge.

See *Kent v. Honsinger*, 167 Fed. 624.

The clerk of the court where suit is pending should deliver certified copies of the order to plaintiff's counsel, who should forward them to the marshal of the district set forth in the order, and copies of the order are to be delivered by the clerk of the court to the marshal of the district where the suit is pending, to be served on the parties in charge of or in possession of the property in suit, if any such person or persons be in possession or charge.

The United States marshal serving the order on the nonresident makes the service and return as provided by statute and rules of equity, in serving and returning subpoenas, and must return the order, with return of service thereon, to the clerk of the court in which the suit is pending. *Forsyth v. Pierson*, 9 Fed. 801; *Woods v. Woodson*, 40 C. C. A. 565, 100 Fed. 517; *Elk Garden Co. v. T. W. Thayer Co.* 179 Fed. 558.

If upon the return of the order it appears that service was made the full number of days before the day of appearance designated in the order, then the cause may proceed under the rules of equity.

If the cause be at common law and the parties do not appear, you may take judgment by default, and if in equity you may enter a decree *pro confesso*, and proceed *ex parte* under the rules of equity. *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625.

### *How Served.*

Must be served by the marshal or his deputy of the Federal district where defendant resides. *Forsyth v. Pierson*, 9 Fed. 801.

### *Publication, Service By.*

It often happens that you do not know where the defendants, or defendant, resides or can be found, so that it is impracticable to apply for, or get, personal service of the warning order. In such case the statute permits service by publication.

In this case your petition or motion must be drawn with this view and in the form already given, except that it must be stated that personal service is impracticable because the

residence or place where the defendant may be found is unknown; that you have used due diligence to discover the residence or whereabouts of the unknown defendant, stating what diligence you have used. In a word, the facts must show the impracticability of personal service mentioned in the statute. *Batt v. Procter*, 45 Fed. 516; *McDonald v. Cooper*, 32 Fed. 745. You must ask an order of publication as to the defendant whose residence and citizenship is unknown. The court may direct the manner of publication of the "warning order," though it cannot be for less than six weeks, as prescribed by the statute; that is, once each week for six successive weeks. *Dick v. Foraker*, 155 U. S. 411, 412, 39 L. ed. 204, 15 Sup. Ct. Rep. 124; *United States v. American Lumber Co.* 80 Fed. 314, 315; *Beattie v. Wilkinson*, 36 Fed. 649; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512.

The warning order must be published as directed by the court, and if the defendant does not appear in obedience to its mandate, and answer, plead, or demur within the time stated in the order, then, upon proof of the publication of the order made in the manner ordered, the court will proceed to adjudicate the case; provided, however, that the defendant may within one year from the judgment enter his appearance and set it aside on payment of costs. The courts have strictly construed the act, and held that personal service of the "warning order" must be made if practicable. *Batt v. Procter*, 45 Fed. 515. The advantage of personal service is of great value to plaintiff, if it can be possibly obtained, as in such case the decree has the ordinary effect from entry, while by publication you have only a conditional decree for one year from entry, and within the time preventing any disposition of the property involved in the suit.

It sometimes happens, when there are several defendants, that the residence of some may be known and others unknown; in such case you should file separate motions or petitions, and prepare separate orders, as the substance and prayer in each case are entirely different, as seen above.

When publication is ordered the court designates the newspaper and time of publication, not less than six weeks, and the manner of publication must be strictly pursued; no other

method than that designated would be legal. *Ibid.*; *McDonald v. Cooper*, *supra*; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 712.

This method of service, as will be seen, is somewhat similar to that prescribed by the statutes of Texas (Batts' Rev. Stat. 1230 to 1235) providing for service on nonresident defendants and defendants whose residence is unknown.

By the State statute any disinterested citizen of the State where the nonresident citizen resides or may be found may serve the notice of suit, and make affidavit of its delivery as a proper return of service, but in the Federal courts the order must be served by a United States marshal of the district of which the citizen to be served is a resident, or can be found. Batts' Rev. Stat. 1231.

Again, in the State statutes, four weeks' (Batts' Rev. Stat. 1235) consecutive publication is sufficient, while six weeks is the minimum in the Federal court. The mode provided by Congress is exclusive. U. S. Supp. 1874, 91, p. 84; *Bracken v. Union P. R. Co.* 5 C. C. A. 548, 12 U. S. App. 421, 56 Fed. 449.

Having thus given the act and the form that may be used in effecting service under it, I will now briefly refer to a few cases interpreting the act.

As stated, the act does not enlarge the jurisdiction, but gives greater scope to the process of the courts in a certain class of cases of which the Federal courts have jurisdiction. *Greeley v. Lowe*, 155 U. S. 65, 39 L. ed. 70, 15 Sup. Ct. Rep. 24; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 285; *Tug River Coal & Salt Co. v. Brigel*, 14 C. C. A. 577, 31 U. S. App. 665, 67 Fed. 625; *Eldred v. American Palace Car Co.* 103 Fed. 211. The act includes suits to enforce any legal or equitable claim to, or lien upon, or to remove cloud from the *title* of real or personal property *within the district where suit is brought*. *Ibid.*; *Spencer v. Kansas City Stockyards Co.* 56 Fed. 745; *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 157; *York County Sav. Bank v. Abbot*, 131 Fed. 983, see S. C. 139 Fed. 993; *Winter v. Koon*, 132 Fed. 273; *Seybert v. Shamokin & Mt. C. Electric R. Co.* 110 Fed. 810. It was not intended to cover anything but real and tangible property susceptible of being reduced to actual posses-

sion, and not incorporeal and intangible interests (*Non-Magnetic Watch Co. v. Association Horlogere Suisse*, 44 Fed. 6), as patent right. *Ibid.*; *York County Sav. Bank v. Abbot*, 139 Fed. 993; *Eldred v. American Palace Car Co.* 45 C. C. A. 1, 105 Fed. 455.

### *Title to Stock.*

In *Jellenik v. Huron Copper Min. Co.* 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559, suit was brought in Michigan Federal district against a corporation of Michigan and citizens of Massachusetts holding certificates of stock. Plaintiff claimed title to the shares of stock so held, and sought a decree removing cloud from the title. It was held that the certificates of stock were only evidence of the ownership of the shares, and the interest represented by the shares was held by the company for the benefit of the true owner; that suit could be brought against the company in its residence district, and nonresident parties claiming ownership of the certificates of stock could be brought in under section 8 to try the title. *Ibid.* 177 U. S. 13, 82 Fed. 778, overruled; *Ryan v. Seaboard & R. R. Co.* 83 Fed. 889. But not where the stock is not held by a defendant who resides within the State where the suit is brought. *McKane v. Burke*, 132 Fed. 688. See *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 153. The statute applies to establish a lien on stock. *Merritt v. American Steel-Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228.

### *Suit to Cancel for Fraud.*

In *Evans v. Charles Scribner's Sons*, 58 Fed. 303, it was held that service under section 738 to cancel a deed for fraud to property within the district of suit could be had, but not to set aside transfers of life policies not within the district issued by a foreign company. *Castello v. Castello*, 4 McCrary, 543, 14 Fed. 207. So may cancel a note for fraud. *Manning v. Berdan*, 132 Fed. 382-385. Or contract to convey.

### *Specific Performance.*

It has been held that the act does not apply to a suit for

specific performance of a contract to convey land, *Municipal Invest. Co. v. Gardiner*, 62 Fed. 954, unless the State statute provided for constructive service in such cases, and that the judgment therein shall be in effect a conveyance. *Single v. Scott Paper Mfg. Co.* 55 Fed. 553; *Bennett v. Fenton*, 10 L.R.A. 500, 41 Fed. 283; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557. But in a suit by a vendee for specific performance, if there is a condition precedent that an abstract of title shall be furnished, and upon failure damage is to be given, then the statute does not apply. See *Adams v. Heckscher*, 83 Fed. 281, 282, S. C. 80 Fed. 742.

### *Suit to Remove Cloud.*

A suit to remove cloud (*Morris v. Graham*, 51 Fed. 53; *Arndt v. Griggs*, supra), comes within the statute (*Lynch v. Murphy*, 161 U. S. 251, 252, 40 L. ed. 689, 16 Sup. Ct. Rep. 523; *Brown v. Pegram*, 143 Fed. 701; *Miller v. Ahrens*, 150 Fed. 644); or by a creditor to set aside a conveyance (*Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; *Evans v. Charles Scribner's Sons*, supra); or to cancel a land patent (*United States v. American Lumber Co.* 80 Fed. 309).

### *Foreclosure of Liens.*

Suits to foreclose liens (*York County Sav. Bank v. Abbot*, 131 Fed. 980, but see 139 Fed. 993; *Ames v. Holderbaum*, 42 Fed. 341; *Deck v. Whitman*, 96 Fed. 890; *Grove v. Grove*, 93 Fed. 865; *Lancaster v. Asheville Street R. Co.* 90 Fed. 132), or to enjoin foreclosure (*Dupont v. Abel*, 81 Fed. 534), come within the statute; or to cancel a mortgage (*Mellen v. Moline Malleable Iron Works*, supra). So a lien on a specific fund (*Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229). So in a suit to establish a trust, service may be had on a nonresident though there be a prayer for accounting (*Porter Land & Water Co. v. Baskin*, 43 Fed. 323).

### *Trying Title.*

Actions to try title at law are within the statute (*Spencer*

v. Kansas City Stock-Yards Co. 56 Fed. 741); or a suit to partition land (Greeley v. Lowe, 155 U. S. 58, 74, 39 L. ed. 69, 75, 15 Sup. Ct. Rep. 24). "Title" in the act is explained in Jones v. Gould, supra.

### *Unknown Heirs.*

We see, then, by virtue of section 8 of the act of 1875, where it is impracticable to get personal service on an absent defendant, as where the residence or habitation of the defendant is unknown, you may serve by publication in the class of cases mentioned in said section; but the question arises, can you sue unknown heirs in the Federal courts in those States where such suits are permitted, as in Texas (see Batts' Rev. Stat. 1236), which provides that a party having a claim against property which may have accrued to the heirs of a deceased person, may sue the heirs whose names are unknown and obtain service by publication. Webster v. Willis, 56 Tex. 468; O'Leary v. Durant, 70 Tex. 409, 11 S. W. 116.

It may be stated that while the Federal courts may sustain a judgment recovered in a State court permitting such service (Arndt v. Griggs, supra; Ormsby v. Ottman, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 494, 495; Connor v. Tennessee C. R. Co. 54 L.R.A. 687, 48 C. C. A. 730, 109 Fed. 936; Lynch v. Murphy, supra), if the statute has been strictly pursued, and where such judgment is brought collaterally in issue in the Federal court (Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. 139 U. S. 148, 35 L. ed. 120, 11 Sup. Ct. Rep. 512; Hollingsworth v. Barbour, 4 Pet. 473-475, 7 L. ed. 925, 926; Harris v. Hardeman, 14 How. 345, 14 L. ed. 449), yet an original suit cannot be brought in the Federal courts and service perfected under the statute providing for service against "unknown heirs." Many reasons may be stated why State statutes of this character cannot be followed in the Federal courts, where citizenship enters so largely into questions touching the jurisdiction of these courts, but the principal reason may be found in the fact that Congress has legislated upon the subject of "service by publication," and having extended it only to cases where the residence of the defendant is unknown, so as to make it impracticable to serve him per-



sonally, it excludes from these courts any other conditions upon which such service can be made. As has been repeatedly said, where Congress has legislated upon a particular subject, State legislation upon the same subject is superseded in Federal courts. *Braken v. Union P. R. Co. supra.*

## CHAPTER LIX.

### SCANDAL AND IMPERTINENCE.

After the appearance has been entered, the defendant is entitled to view the bill and take a copy thereof, and, if scandalous or impertinent, must take steps before the next rule day to have the bill referred to a master to expunge the scandalous or impertinent matter (equity rule 27); otherwise it is waived.

Scandal consists in unnecessary allegations bearing cruelly on the moral character of an individual, or in anything stated contrary to good manners, or unbecoming the dignity of the court to hear. *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55. However, nothing relevant, though injurious, is scandalous. *Mercantile Trust Co. v. Missouri & T. R. Co.* 84 Fed. 379; *Burden v. Burden*, 124 Fed. 255; *South & North Ala. R. Co. v. Railroad Commission*, 171 Fed. 225; *Mound City Co. v. Castleman*, 171 Fed. 521.

Impertinence consists in allegations irrelevant to the issues made or tendered; this includes tautology and verbosity. *Ibid.*; *Harrison v. Perea*, 168 U. S. 318, 42 L. ed. 481, 18 Sup. Ct. Rep. 129; *Polk v. Mutual Reserve Fund Life Asso.* 128 Fed. 524. So stating unnecessary recitals of written instruments forbidden by equity rule 26 is impertinence. *Ibid.*; *Electrolibration Co. v. Jackson*, 52 Fed. 776.

Equity rule 26 expressly forbids scandal or impertinence in framing the bill, and provides for having it stricken out at the costs of the pleader. If scandalous or impertinent matter appears in a bill, exceptions for that cause must be taken at once.

Equity rule 27 provides that no order shall be made by any judge for referring any bill or answer, as for scandal or impertinence, unless exceptions are taken in writing and signed by counsel pointing out the scandalous matter. *Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co.* 46 Fed. 73;

*Blanton v. Chalmers*, 158 Fed. 907; *Stirrat v. Excelsior Mfg. Co.* 44 Fed. 142; *Howe & D. Co. v. Hangan*, 140 Fed. 182. It cannot be raised by demurrer, nor unless the exceptions shall be filed on or before the next rule day after the process on the bill is returnable, etc. The exception may be in the following form:

Title as in bill.

And now comes the defendant (or plaintiff if it be to the answer) and excepts to the bill filed in this cause (or answer) for scandal and impertinence, for that it appears in said bill that plaintiff has alleged and stated (here describe the particular passages which are considered scandalous or impertinent [Rule 27]). That said language is an unnecessary and cruel attack upon the character of..... (or the language is indecent or contrary to good morals, etc.) (or if impertinent state), the allegations of the bill are rambling, disconnected, tautalogical, verbose, and not pertinent to any issue made or tendered.

Wherefore defendant prays that the bill may be referred to the Hon. E. F., standing master of his honorable court (or to A. B. as special master), that so much of the matter as is scandalous and impertinent may be expunged, and that the costs of these exceptions (or motion) be charged against plaintiff (or defendant if to the answer).

This exception must be signed by counsel, and must be filed on or before the next rule day after the process on the bill shall be returnable, or if exceptions are taken to the answer, then on or before the next rule day after the answer is filed.

While the rule provides that the issue must be made by exceptions, it may be done by simple motion, using the form above given, and praying for reference to a master to strike out the impertinent matter before being required to answer. See *Hall v. Bridgeport Trust Co.* 122 Fed. 163; *Kelley v. Boettcher*, 85 Fed. 55; *Polk v. Mutual Reserve Fund Life Asso.* 128 Fed. 526; *Hobbs Mfg. Co. v. Gooding*, 100 C. C. A. 83, 176 Fed. 264; but see *United States v. Kettenbach*, 175 Fed. 463. But whether exception is taken, or a motion filed, it must be promptly made on or before the rule day, as above stated.

The objection is purely formal and technical, and its purpose is to require clearness in pleading, and the court will not permit any delay in presenting it; one must come strictly within the rule or the court will refuse to order a reference and

require an answer, and the same action will be taken by the court if not pressed for action after being filed in time. The party obtaining the order must, without delay, procure the master to examine and report upon the exceptions, on or before the next succeeding rule day after submission to him, unless the master certifies further time is necessary.

In dealing with exceptions of this character, and particularly when the exceptions are because of impertinence in the bill, they should not be allowed unless it is clear that the matter excepted to cannot be material to the plaintiff's case. *Wells F. & Co. v. Oregon R. & Nav. Co.* 8 Sawy. 600, 15 Fed. 561.

Sometimes the matter complained of may be material, or may in the opinion of the master, become material in the progress of the case, though not clearly apparent then, in which case the matter will be permitted to remain in the bill, subject to be determined on the exceptions on final hearing.

While the rule contemplates a reference to a master, the court may act upon the exceptions and expunge the matter when clearly scandalous or impertinent.

Great prolixity, verbosity, and obscurity is always objectionable and may be excepted to for impertinence. *Kelley v. Boettcher*, 29 C. C. A. 14, 56 U. S. App. 363, 85 Fed. 55-61. In this case the bill was stricken from the files and the complainant limited to twenty-five typewritten pages. As to penalty for scandalous briefs, see *Kelley v. Boettcher*, 27 C. C. A. 177, 49 U. S. App. 620, 82 Fed. 794; *Green v. Elbert*, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188.

## CHAPTER LX.

### DISMISSAL OF BILL BY PLAINTIFF.

The bill having been filed and process issued, I will now discuss what steps plaintiff must take to dismiss his bill.

The dismissal of a bill is either voluntary by plaintiff, or involuntary by the court on motion, or by the court on its own motion. Involuntary dismissals will be discussed under defenses in equity.

The general rule is that the plaintiff has the right, at any time before an interlocutory or final decree in a case, to dismiss it on paying costs, and without prejudice to his right to file another, and where the dismissal will deprive the defendant of no substantial right accrued since the suit commenced and the defendant has not prayed for affirmative relief to which he would be entitled. *Morton Trust Co. v. Keith*, 150 Fed. 606; *Houghton v. Whitin Mach. Works*, 160 Fed. 227; *Gilmore v. Bort*, 134 Fed. 659; *McCabe v. Southern R. Co.* 107 Fed. 214; *Pennsylvania Globe Gaslight Co. v. Globe Gaslight Co.* 121 Fed. 1015; *Ebner v. Zimmerly*, 55 C. C. A. 430, 118 Fed. 818; *United States ex rel Coffman v. Norfolk & W. R. Co.* 55 C. C. A. 320, 118 Fed. 554; *Welsbach Light Co. v. Mahler*, 88 Fed. 427; *Chicago & A. R. Co. v. Union Rolling Mill Co.* 109 U. S. 702-713, 27 L. ed. 1081-1085, 3 Sup. Ct. Rep. 594; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 145, 43 L. ed. 108, 111, 18 Sup. Ct. Rep. 808; *Stevens v. The Railroads*, 4 Fed. 97-105; *Detroit v. Detroit City R. Co.* 55 Fed. 572. This general rule has its conditions and exceptions.

In the first place, you cannot dismiss without a motion and notice, and an order of the court; dismissal by an order as of course is not known in the Federal practice. This means that the pleading must be submitted to the court, and there must be the exercise of some discretion in granting it. *Electrical Ac-*

cumulator Co. v. Brush Electric Co. 44 Fed. 604; Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 838; Penn Phonograph Co. v. Columbia Phonograph Co. 66 C. C. A. 127, 132 Fed. 809.

Again, the plaintiff cannot dismiss where such dismissal would prejudice the defendant, or where rights have been fixed by an interlocutory decree (see authorities cited above; Callahan v. Hicks, 90 Fed. 539; Pullman's Palace-Car Co. v. Central Transp. Co. 49 Fed. 261; Electrical Accumulator Co. v. Brush Electric Co. 44 Fed. 604, 605; Hat-Sweat Mfg. Co. v. Waring, 46 Fed. 87; Hershberger v. Blewett, 55 Fed. 172), or where the defendant seeks affirmative relief. Ibid. The refusal to dismiss when the rights of the defendant may be prejudiced does not mean that by the dismissal he may be burdened by another suit, but the record must show some right upon which he should be heard and which is properly in issue. Western U. Teleg. Co. v. American Bell Teleph. Co. 50 Fed. 664; Pullman Palace Car v. Central Transp. Co. 171 U. S. 138, 161, 43 L. ed. 108, 117, 18 Sup. Ct. Rep. 808. Especially is this the case when an issue has been sent to the master and decided for defendant. Detroit v. Detroit City R. Co. 55 Fed. 572.

So, where parties agree to refer to a master, the plaintiff cannot dismiss. American Bell Teleph. Co. v. Western U. Teleg. Co. 16 C. C. A. 367, 21 U. S. App. 627, 69 Fed. 666, overrules 50 Fed. 662. See Walters v. Western & A. R. Co. 69 Fed. 710.

Again, the plaintiff will not be allowed to dismiss, if in the light of the proceedings the defendant is reasonably entitled to a decree. Chicago & A. R. Co. v. Union Rolling Mill Co. 109 U. S. 713-716, 27 L. ed. 1085-1087, 3 Sup. Ct. Rep. 594; Hershberger v. Blewett, 55 Fed. 170; Pullman Palace Car Co. v. Central Transp. Co. 171 U. S. 146, 43 L. ed. 112, 18 Sup. Ct. Rep. 808. But if the circumstances were such that on final hearing the plaintiff would be allowed to dismiss without prejudice, then a dismissal without prejudice may be permitted. Stevens v. The Railroads, 4 Fed. 97.

Again, if nothing has been done for two years after it has been at issue, plaintiff will not be allowed to dismiss. Welsbach Light Co. v. Mahler, supra. Plaintiff cannot dismiss

where new action would bar defendant's relief. *Callahan v. Hicks*, 90 Fed. 543.

Where there is more than one plaintiff, any one of them may dismiss as to himself, if without prejudice to other parties, or may dismiss as to one or more defendants under similar conditions. The motion to dismiss may be as follows:

Title as in bill.

To the Honorable Judges of the Circuit Court of the United States in and for the.....District of the State of .....

Your petitioner, having exhibited his bill in this honorable court on the .....day of .....A. D. 19.., against C. D., defendant, is, since the filing of the same, advised to proceed no further; wherefore he prays that the bill may stand dismissed without prejudice.

R. F.,  
Solicitor, etc.

This form is sufficient, noting, however, the following conditions:

First. If the defendant has not appeared, so state, and the court will grant the dismissal.

Second. If the defendant has appeared, so state, and further state if any action has been taken by him, and, if so, what.

Third. If the defendant has appeared and taken action, but consents to the dismissal, then let his solicitor sign the motion with plaintiff's solicitor.

The motion may be heard in vacation, or any rule day, proper notice having been given of the application.

The practice in dismissing is to use the words "without prejudice," for if you do not, the presumption is that it was heard on its merits. *Graves v. Faurot*, 64 Fed. 242; *Howth v. Owens*, 30 Fed. 911; *Durant v. Essex Co.* 7 Wall. 109, 19 L. ed. 156; *Lyon v. Perin & G. Mfg. Co.* 125 U. S. 702, 31 L. ed. 841, 8 Sup. Ct. Rep. 1024; *Garner v. Second Nat. Bank*, 89 Fed. 636; *Stratton v. Essex County Park Commission*, 145 Fed. 436. We have then the rule.

A decree dismissing a bill generally may be set up as a bar, but if dismissed "without prejudice," or on grounds other than on merit, it cannot be set up in bar. *Walden v. Bodley*, 14 Pet. 161, 10 L. ed. 400; *United States Fastener Co. v. Bradley*, 143 Fed. 530; *Clark v. Bernhard Mattress Co.* 82 Fed. 340. *Ex parte Loung June*, 160 Fed. 254.

So, dismissal by consent, showing no adjustment, cannot be set up in bar to a second suit. *Marshall v. Otto*, 59 Fed. 249. Nor is it appealable, because not final if dismissed without prejudice. *Fidelity Ins. Trust & S. D. Co. v. Dickson*, 24 C. C. A. 60, 46 U. S. App. 691, 78 Fed. 207.

A voluntary dismissal will not be reinstated unless there is fraud or mistake. *Willard v. Wood*, 164 U. S. 521, 41 L. ed. 539, 17 Sup. Ct. Rep. 176. (See "Dismissal by Defendant," chap. 78; "Effect on Cross Bill," chap. 79.)



## CHAPTER LXI.

### AMENDING BILL.

I will now discuss what steps the plaintiff should take to perfect his bill when, through inadvertence or change in conditions, it becomes necessary.

First. When he can amend his bill.

Second. When he must file a supplemental bill.

Third. When he must file a bill of revivor.

#### *Office of Amendment.*

An amendment is intended to cure the defective statement of a cause of action existing when the bill was filed. *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 120; Sec. 954, U. S. Rev. Stat.; U. S. Comp. Stat. 1901, p. 696; Equity rules 28 and 29. It cannot be used to set up a cause of action that did not exist when the bill was filed. *Ibid*.

#### *When Bill Can Be Amended.*

First. Amendment as of course. Amendments of course may be made and without costs at any time before a copy of the bill is taken from the office by the defendant or his solicitor. Equity rule 28.

Second. Amendments of course may be made after a copy has been taken out of the clerk's office, in such matters as filling blanks, correcting dates and names of parties; also misdescription of the premises, clerical errors, and matters of form. Equity rule 28.

Third. Plaintiff may amend (of course) in a material point after a copy of the bill has been taken out, and before any answer, plea, or demurrer has been filed; but he shall pay to the defendant the costs occasioned thereby, and shall without delay

furnish a fair copy of the amendment to the solicitor or defendant, free of expense, with suitable references as to where the amendments are to be inserted. Equity rule 28; Insurance Co. of N. A. v. Svendsen, 74 Fed. 347; Chase Electric Constr. Co. v. Columbia Constr. Co. 136 Fed. 699. Where there are several defendants, copies must be furnished to each defendant affected thereby, or to the solicitor of the defendants.

Where the amendments are numerous the plaintiff will be required to furnish a copy of the whole bill as amended, instead of the separate amendments. Service of a copy on the solicitor of all the defendants, or on the different solicitors representing different defendants affected by the amendments, is sufficient.

### *Amendments Not of Course.*

After answer, plea, or demurrer has been filed, but *before replication* by plaintiff, the plaintiff may on motion filed and without notice, obtain an order to amend his bill on or before the next rule day. Equity rule 29; Gubbins v. Laughtenschlager, 75 Fed. 619; Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. ed. 815. The matter is in the hands of the court, and not reviewable unless there is a clear abuse of discretion. McKemy v. Supreme Lodge A. O. U. W. 180 Fed. 966, 967; Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, overrules Shields v. Barrow, 17 How. 130, 15 L. ed. 158. The matter of costs is discretionary with the court. Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 754 and cases cited. After plaintiff has filed his replication the case is at issue and prepared for the testimony. Plaintiff then cannot amend his bill except on motion and after its service on the defendants or their solicitors. The motion must be accompanied with an affidavit that it is not made for delay, or vexatiously, that the amendment is material and could not with reasonable diligence have been sooner introduced in the bill. Equity rule 29; Beavers v. Richardson, 118 Fed. 320; Gubbins v. Laughtenschlager, 75 Fed. 619, 620. The motion should offer to submit to such terms as the judge may deem necessary to speed the cause, and should be accompanied with the proposed amendment. Washington, A. & G. R. Co. v.

Bradley (Washington & A. & G. R. Co. v. Washington), 10 Wall. 299, 19 L. ed. 894.

If the motion to amend either after answer, plea, or demurrer and before replication or after replication, be allowed, the amendment must be filed on or before the next rule day after the order is granted, unless some other time is designated by the court. If plaintiff fails to do so, the authority to amend will be considered abandoned, and the cause will proceed as if abandoned. Equity rule 30; Boston & A. R. Co. v. Parr, 98 Fed. 484.

Sometimes the answer makes it necessary to amend the bill. This must be done on motion, and leave will be granted, with or without costs, as to the court may seem proper. Equity rule 45; Southern P. R. Co. v. United States, 168 U. S. 55, 42 L. ed. 379, 18 Sup. Ct. Rep. 18. You cannot meet matter in answer by special replication. Southern P. R. Co. v. United States, 168 U. S. 2, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Equity rule 45; Mason v. Hartford, P. & F. R. Co. 10 Fed. 334, 335.

Such are the rules prescribed for amending a bill in equity by plaintiff, but the power of a court of equity to grant an amendment at any stage of the case seems to rest alone in the discretion of the court, unhampered by rules, if justice requires the amendment. Hardin v. Boyd, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Equity rules 28, 29, 45, 46; U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696; Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 754 and cases cited; United States v. American Bell Teleph. Co. 39 Fed. 716; American Steel & Wire Co. v. Wire Drawer's & Die Makers' Unions Nos. 1 & 3, 90 Fed. 598-602; Neale v. Neale, 9 Wall. 8, 9, 19 L. ed. 591, 592; Re Glass, 119 Fed. 511.

It has been frequently declared that the power to permit amendments must be controlled by the case, and not by stated rules, and it has been the practice of Federal courts to be guided by the special circumstances in permitting amendments at any stage of the proceedings. Hardin v. Boyd, 113 U. S. 761, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771; Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 754; Gubbins v. Laughtenschlager, 75 Fed. 619. And the granting or refusing amendments, being a matter of discretion, will not be revised by an

appellate court, unless there be an apparent gross abuse of the court's discretion. *Wright v. Hollingsworth*, 1 Pet. 168, 7 L. ed. 98; *Brown v. Schleier*, 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. Rep. 558; *Hicklin v. Marco*, 6 C. C. A. 10, 15 U. S. App. 55, 56 Fed. 552; *Chapman v. Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; *Blalock v. Equitable Life Assur. Soc.* 21 C. C. A. 208, 41 U. S. App. 761, 75 Fed. 47.

While it is not proper to sacrifice the ends of justice to rigid technical rules, yet upon the other hand, this nonrevisable discretion of the chancellor has some disadvantages. However, it will be seen that, as the cause progresses, the courts, as they should do, use greater caution in permitting amendments, and preventing, if possible, inconvenience and expense. *Gibbins v. Laughtenschlager*, 75 Fed. 619; *Hodges v. Kimball*, 34 C. C. A. 103, 63 U. S. App. 688, 91 Fed. 851; *Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348. Thus, after the cause has been prepared for trial, and hearing had, and fully submitted, the discretion of the chancellor is not easily moved to grant an amendment on material matters. *Gubbins v. Laughtenschlager*, 75 Fed. 619, and authorities.

### *Amendments At and After Trial.*

But we find cases where the courts have not hesitated to permit the pleadings to be changed and adapted to the proofs at any stage of the cause after replication filed. U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696; *Manitowoc Malting Co. v. Fuechtwanger*, 169 Fed. 983; *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Burgess v. Graffam*, 10 Fed. 219; *Bass v. Christian Teigen-span*, 82 Fed. 260; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Bowden v. Burnham*, 8 C. C. A. 248, 19 U. S. App. 448, 59 Fed. 755; *Collinson v. Jackson*, 8 Sawy. 357, 14 Fed. 305; *Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 568, 15 Mor. Min. Rep. 314; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 692; *Nellis v. Pennock Mfg. Co.* 38 Fed. 379; *Re Sanford Tool Co.* 160 U. S. 259, 40 L. ed. 417, 16 Sup. Ct. Rep. 291.

In *Neale v. Neale*, 9 Wall. 1-12, 19 L. ed. 590-593, the

cause had been heard but decree not entered, but it appeared that the evidence showed a different case for equitable relief than stated in the bill, but supported a case for equitable relief. The court permitted an amendment to conform to the proof, stating that it was clearly in the court's discretion, but it has been uniformly held that the amendment must be consistent with the substance of the original bill, that is, you will not be permitted to make a new suit by amendment either as to parties or cause of action. (Authorities above); *Confectioners' Machinery & Mfg. Co. v. Racine Engine & Mach. Co.* 163 Fed. 918; *Pendery v. Carleton*, 30 C. C. A. 510, 59 U. S. App. 288, 87 Fed. 41. Where, after pleadings are closed and evidence taken it becomes necessary to amend, it must be done by amendment, and not by a substituted bill. *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 176 Fed. 746. Change in interest of parties cannot be introduced by amendment. *Land Co. v. Elkins*, 22 Blatchf. 204, 20 Fed. 546; *The Ask*, 156 Fed. 681-682; *Savage v. Worsham*, 104 Fed. 18-19; *Maynard v. Green*, 30 Fed. 644; *Judson v. Courier Co.* 25 Fed. 706; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* 38 Fed. 58.

In the instances where amendments have been permitted after issue joined and proofs taken, it will be seen that it was shown the plaintiff was entitled to equitable relief under the general prayer, though it may be different from that sought in the special prayer. *Ibid.*; *Neale v. Neale*, 9 Wall. 1, 19 L. ed. 590; *Walden v. Bodley*, 14 Pet. 164, 10 L. ed. 401; *Bass v. Christian Feigenspan*, 82 Fed. 261; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 414, 35 L. ed. 1061, 12 Sup. Ct. Rep. 188.

It has been frequently decided that the amendment permitted by equity rule 29, that is, after replication, is not intended to permit the plaintiff to strengthen his case, or change the character and quantity of relief, but to enable the court to do complete justice when a case for relief is made out, and not specifically asked for in the prayer. *Ibid.*; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Maynard v. Green*, 30 Fed. 644; *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 176 Fed. 746; *The Tremolo Patent*, 23 Wall. 527, 23 L. ed. 98.

The amendment must harmonize with the whole case in its essential features, and must not change the subject-matter. *Anthony v. Campbell*, 50 C. C. A. 195, 112 Fed. 217. In *Richmond v. Irons*, 121 U. S. 46, 47, 30 L. ed. 870, 871, 7 Sup. Ct. Rep. 788, you will find that while the amendment was a departure from the original case, yet it was permitted on the ground that the amendment made was germane to the original purpose. In *Shields v. Barrow*, 17 How. 143, 15 L. ed. 161, a bill to set aside an agreement for fraud was not permitted to be amended so as to ask for specific performance. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 33 Fed. 448; *Merriman v. Chicago & E. I. R. Co.* 12 C. C. A. 275, 24 U. S. App. 428, 64 Fed. 551.

Again, when the matter has not been sufficiently put in issue by the bill, or when the prayer is not consistent with the case made, the court will permit an amendment at the trial (*Graffam v. Burgess*, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686; *Richmond v. Irons*, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788; *Hardin v. Boyd*, 113 U. S. 761, 28 L. ed. 1142, 5 Sup. Ct. Rep. 771), and make the prayer conform to the proof. *Ibid.*; but see *Bass v. Christian Feigenspan*, 82 Fed. 261; *Maynard v. Green*, 30 Fed. 644. In *Cotten v. Fidelity & C. Co.* 41 Fed. 510, it was held that an amendment may be filed at any time before decree to bring the merits fairly to trial, but some courts have held that if the facts were known, or ought to have been known, leave to file an amendment after the facts are in will be refused.

Thus in *Gubbins v. Laughtenschlager*, 75 Fed. 622, the suit began in 1892, and the decision was filed in 1896, when the amendment was sought to be made, but it was denied because no reason was shown why the point was not sooner presented; but you will find in *Smith v. Babcock*, 3 Sumn. 583, Fed. Cas. No. 13,008 and *Calloway v. Dobson*, 1 Brock. 119, Fed. Cas. No. 2,325 an amendment was permitted, though the facts were known, but not deemed material.

In *Graffam v. Burgess*, 117 U. S. 197, 29 L. ed. 844, 6 Sup. Ct. Rep. 686, a formal charge of fraud was permitted to be added at the trial by amendment.

In *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 57, it was held that you may strike out

an allegation, or leave out parties at the trial, and change the allegation and prayer. *Insurance Co. of N. A. v. Svendsen*, 74 Fed. 348. So you may add a claim inadvertently omitted. *Nellis v. Pennock Mfg. Co.* 38 Fed. 379. Or dismiss a party. *Victor Talking Mach. Co. v. American Graphophone Co.* 118 Fed. 50.

As to the practice of the Texas courts in allowing amendments during the progress of the case, see *Fidelity & C. Co. v. Carter*, 23 Tex. Civ. App. 359, 57 S. W. 316, and authorities.

As to amending as to parties, see *Lusk v. Kimball*, 87 Fed. 545. *Van Doren v. Pennsylvania R. Co.* 35 C. C. A. 282, 93 Fed. 261; *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 171.

### *Amendment After Decree.*

In *The Tremolo Patent*, 23 Wall. 518, 23 L. ed. 97, the court says you may amend your bill after decree, if the cause was tried as if the bill had contained the averment sought to be made, and defendants would not be prejudiced by the amendment. *Graffam v. Burgess*, 117 U. S. 195, 29 L. ed. 844, 6 Sup. Ct. Rep. 686; *Re Glass*, 119 Fed. 511; *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.* 20 Fed. 505; *Zeillin v. Rogers*, 10 Sawy. 200, 21 Fed. 103; *Gubbins v. Laughtenschlager*, 75 Fed. 620; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L.R.A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 692.

### *Amendment to Cure Jurisdiction.*

You may amend to cure jurisdiction, thus when proper jurisdictional allegations are not made,—as, where “residence,” and not “citizenship,” is alleged, the appellate courts have reversed, permitting the bill to be amended. *Stockwell v. Boston & M. Co.* 131 Fed. 153; *Sambo v. Union P. Coal Co.* 146 Fed. 80; *Menard v. Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 540, 48 L. ed. 784, 24 Sup. Ct. Rep. 576; *Betzoldt v. American Ins. Co.* 47 Fed. 705; *Marthinson v. Winyah Lum-*

ber Co. 125 Fed. 633; King Bridge Co. v. Otoe County, 120 U. S. 227, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; Metcalf v. Watertown, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173. It is in the discretion of the court. Pacific Mut. L. Ins. Co. v. Tompkins, 41 C. C. A. 488, 101 Fed. 539.

So, where objection to the jurisdiction of the court has been sustained, the plaintiff has a right to amend the bill (Equity rule 28; Ins. Co. of N. A. v. Svendsen, 74 Fed. 347; Hardon v. Boyd, 113 U. S. 761, 28 L. ed. 1142, 5 Sup. Ct. Rep. 771; Riggs v. Brown, 172 Fed. 637) by striking out or shifting parties. After decree *pro confesso* on bill showing no jurisdiction, amendment was allowed to cure it (Nelson v. Eaton, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376); but it seems that where facts are to be alleged, as in equity rule 94, to give a Federal court jurisdiction, you cannot amend to give jurisdiction (Dickinson v. Consolidated Traction Co. 114 Fed. 233), nor to defeat jurisdiction (Gibbins v. Laughtenschlager, 75 Fed. 616).

#### *Amendment as to Amount.*

You may amend as to amount if not definitely stated. Home Ins. Co. v. Nobles, 63 Fed. 641.

#### *Effect of Amendment.*

Amending a bill is a continuation of the original, if no new parties are made (French v. Hay [French v. Stewart], 22 Wall. 246, 22 L. ed. 856), or new suit (Columbia Valley R. Co. v. Portland & S. R. Co. 89 C. C. A. 361, 162 Fed. 609).

If the amendment is of a material matter, time must be allowed the defendant to answer. Nelson v. Eaton, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378. The amendment must not deprive the defendant of any defense or create any disadvantage (Richmond v. Irons, 121 U. S. 47, 30 L. ed. 870, 7 Sup. Ct. Rep. 788), and, as will be hereafter seen, if the amendment is made after the answer is filed, it authorizes the defendant to make an entirely new answer though it may contradict the former one. Blythe v. Hinkley, 84 Fed. 244; Nelson v. Eaton, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378;



North Chicago Street R. Co. v. Chicago Union Traction Co. 150 Fed. 631-633. However, if an amendment is allowed on hearing an interlocutory injunction, it takes effect at once, if no new parties are made. American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union Nos. 1 & 3, 90 Fed. 598; U. S. Rev. Stat. sec. 954; U. S. Comp. Stat. 1901, p. 696. Or if the merits are not particularly affected by the amendments and new parties, requiring further process, the plaintiff may proceed without further answer. In Columbia Valley R. Co. v. Portland & S. R. Co. 89 C. C. A. 361, 162 Fed. 603. A distinction is drawn as to time of taking effect between an amended bill and amendments to a bill. An amended bill speaks from the time it is filed, and not from the filing of the original bill.

In North Chicago Street R. Co. v. Chicago Union Traction Co. 150 Fed. 613, it was strenuously urged and sustained that an amendment to a bill does not entitle the defendant to answer anew the entire bill, but only the amended matter.

### *Motion to Amend.*

We have seen that where the amendment is not of course, and is sought to be made after plea, demurrer, or answer, that a motion must be filed asking permission, though it need not be served on the opposite party. Riggs v. Brown, 172 Fed. 637. This motion must be made promptly, Boston & A. R. Co. v. Parr, 98 Fed. 484, and the following form may be used. Equity rule 35:

Title as in bill, and address.

And now comes plaintiff and begs leave to file the amended bill hereto attached (or the following amendment) to the bill heretofore filed on the .....day of.....A. D. 19..

R. F.,  
Solicitor, etc.

See Beavers v. Richardson, 118 Fed. 320.

The amendment must be stated as follows, where you do not have to file an entirely new bill, because of the numerous amendments required. Equity rule 28.

Title as in bill.

Now comes the plaintiff and by leave of the court amends his bill, in

the manner following: After the words, etc., on line..... of the .....page of the bill insert.....(and so on), or that the allegation beginning on line..... of..... page of the bill be so amended as to read.....; or after the word.....on.....line, page.....of the bill, strike out the words.....

R. F.,  
Solicitor.

In this manner you may insert or strike out words and sentences until the bill conforms to your purpose. The amendment should be attached to the motion. But we have seen that the motion to amend and the amendments must be served on the opposite party or his solicitor, first, When a copy of the bill has been taken out of the clerk's office (and the amendment material) and before defendant has answered, plead, or demurred. Equity rule 28. And, second, When the replication has been filed and the cause at issue; and in this last case the motion is to be accompanied by an affidavit that it is not made for delay, etc., as previously stated. Equity rule 29. Third. When the answer makes it necessary to amend the bill. Equity rule 45.

You should, under these conditions, file a motion and service notice as follows:

Title as in bill.

To Messrs ....., Solicitors for Defendants, etc.:

You will please take notice that I shall make a motion before the Hon. ...., Judge of the Circuit Court of the United States for the..... district of ....., on the.....day of ....., A. D. 19.., being the rule day in..... at.....a. m., in the city of ..... (or at chambers in the city of.....), or as soon thereafter as counsel can be heard, for leave to amend the bill (or answer) filed in this cause on such terms as the court may direct, a copy of which amendments (and affidavits if made after replication filed) to be presented is served on you.

R. F.,  
Solicitor, etc.

The affidavit necessary to support the motion to amend after replication filed (equity rule 29), must follow the rule and show that the amendments asked are not made for delay, or vexatiously, that they are material, and could not with diligence have been sooner introduced in the bill. Again, the motion to permit the amendment must offer to submit to terms.

*When Amendment to Be Filed.*

After permission to amend has been granted, the plaintiff has until the next rule day to file his amendment or amended bill, and on failure to do so he will be considered to have abandoned his amendment, and the cause will so proceed. Equity rule 30; *Boston & A. R. Co. v. Parr*, 98 Fed. 484.

*Amendment After Appeal.*

A motion to amend a bill in the court of appeals so as to retain jurisdiction can only be made by consent. *Fitchburg R. Co. v. Nichols*, 29 C. C. A. 464, 50 U. S. App. 280, 85 Fed. 869; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 617. But, as we have seen, the judgments may be reversed and amendment allowed in the court below without consent. *Ibid.*; *United States v. Hopewell*, 2 C. C. A. 510, 5 U. S. App. 137, 51 Fed. 798. Thus when a bill has been dismissed on demurrer for laches, the appellate court may send it back for amendment, showing excuse for delay. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 161.

When an amendment is sought to be made after appeal, it will not be permitted if it requires new evidence. *American Bell Teleph. Co. v. United States*, 15 C. C. A. 569, 33 U. S. App. 236, 68 Fed. 570. The record must show the evidence to sustain the allegations sought to be made. *Ibid.*

We see now that under section 954 amendments have been allowed at every stage of the case from the summons to the final judgment. *McDonald v. Nebraska*, 41 C. C. A. 278, 101 Fed. 177.

*Not Affected by State Statutes.*

The right to allow amendments in the Federal courts is not affected by State Statutes. *Mexican C. R. Co. v. Duthie*, 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Oliver v. Raymond*, 108 Fed. 927; *Kent v. Bay State Gas Co.* 93 Fed. 887.

## CHAPTER LXII.

### SUPPLEMENTAL BILL.

Equity rule 57 provides that whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party; and if leave be given to file such supplemental bill, the defendant shall demur, plea, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time be assigned by the judge. *Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 489; *Thompson v. Schenectady R. Co.* 119 Fed. 638; *Kennedy v. Bank of Georgia*, 8 How. 610, 12 L. ed. 1218; *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 325; *Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 24; *Chester v. Life Asso. of America*, 4 Fed. 489; *Reeve v. North Carolina Land & Lumber Co.* 72 C. C. A. 287, 141 Fed. 821-834; *Curtis Davis & Co. v. Smith*, 105 Fed. 949; *Oregon & Transcontinental Co. v. Northern P. R. Co.* 32 Fed. 428; *Napier v. Westerhoff*, 153 Fed. 985; *Pittsburgh, S. & N. R. Co. v. Fiske*, 101 C. C. A. 560, 178 Fed. 67, and cases cited. Where there is a change of interest by complainant and no supplemental bill filed, the bill will be dismissed (*Pittsburgh, S. & N. R. Co. v. Fiske*, 178 Fed. 67-69, and cases cited), but not where the defendant has assigned his whole interest (*Ibid.*; 67, 68, and cases cited).

Equity rule 58 provides that it shall not be necessary in a supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case require it.

These rules are self-explanatory, and obviously mean that any change of interest in the parties, or if a larger or different kind of relief is required by reason of events arising after the suit, then a supplemental bill is the proper proceeding to bring it before the court, and not by amendment; providing, always, that the complainant had a cause of action when the original bill was filed and it was set forth in the original bill. *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 120; *Chicago Grain Door Co. v. Chicago, B. & Q. R. Co.* 137 Fed. 103, and cases cited; *Banks Law Pub. Co. v. Lawyers' Co-op. Pub. Co.* 139 Fed. 702; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 754.

Frequently after filing a suit, circumstances changing conditions, as a change of interest in parties, renders it necessary to bring in new parties, or perhaps some new fact had arisen affecting the subject-matter. This should be brought in by supplement, which is in effect a method of amendment. It is a continuation of the original bill, and adds to the former proceeding what is necessary for the court to enter a complete decree. *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 752; *Napier v. Westerhoff*, 153 Fed. 985; *Lang v. Choctaw, O. & G. R. Co.* 87 C. C. A. 307, 160 Fed. 356; *Reeve v. North Carolina Land & Timber Co.* 72 C. C. A. 287, 141 Fed. 821; *Chapman v. Yellow Poplar Lumber Co.* 74 C. C. A. 331, 143 Fed. 201; *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 606; *Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 486.

The province, then, of the supplemental bill, is to supply some defect in the structure of the original bill when this cannot be done by amendment, or to introduce matters occurring subsequent to the filing of the original bill.

In the light of equity rules 28 and 29, and U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696, providing for amendments to bills at any progress of the cause, and the construction of courts permitting amendments at any stage, and in view of a further recognized rule of practice, that when the same end can be obtained by amendment, a supplemental bill will not lie (*Henry v. Travelers' Ins. Co.* 45 Fed. 302), it results

that purely supplemental bills are only necessary in a few cases.

It is difficult under the various decisions to trace the line of demarcation where amendment ends and supplement begins; however, under equity rule 57 a supplemental bill is proper when the bill becomes defective (as when a new interest or right because of a change of interest in parties or of the subject-matter), requiring new facts to be alleged, which has accrued to one or all of the parties after the bill has been filed, thereby creating a defect in the structure of the bill. *Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 489, and authorities cited at beginning of the chapter; *Cedar Valley Land & Cattle Co. v. Coburn*, 29 Fed. 586; *New York Secur. & T. Co. v. Lincoln Street R. Co.* 74 Fed. 68; *Anglo-Florida Phosphate Co. v. McKibben*, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529; *DeForest v. Thompson*, 40 Fed. 375; *Maynard v. Green*, 30 Fed. 644; *Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 315.

To illustrate: When the plaintiff has sued in another right, and his interest has determined by the appointment of a successor (*Phipps v. Sedgwick*, 95 U. S. 10, 24 L. ed. 594), such as a change of trustees, or where there has been a partial transfer of interest by the original plaintiff, or by one of several original plaintiffs (*Campbell v. New York*, 35 Fed. 14); or where there happens to be one born with same class of interest as the parties to the bill; or when the husband and wife are parties, and by the death of one a new interest survives to the other; or where a party who is a *feme sole* marries during suit, a supplemental bill can be filed. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 327-329. But where the facts to be set up existed before suit and by reasonable diligence could have been discovered and pleaded by way of amendment, then a supplemental bill will not be allowed. *Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 315.

### *When No Cause in Original Bill.*

If complainant has no ground for belief in the original bill, then you cannot file a supplemental; but if the original bill is sufficient for one kind of relief, and facts subsequently occur

giving another kind of relief and more extensive, then it may be set up by supplement, but it is in the discretion of the court. *Henderson v. 300 Tons of Iron Ore*, 38 Fed. 40; *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 334; *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 116-120; *Putney v. Whitmire*, 66 Fed. 385; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791. When supplemental bill is permitted, you may set up matters that were omitted from the original bill. *Mellor v. Smither*, 52 C. C. A. 64, 114 Fed. 116.

### *After Decree.*

It may be stated as a rule that after decree a supplemental bill must be filed when you require some aid in the execution of the decree, or further directions, or where a purchaser of the subject-matter desires to obtain the benefit of the decree. *Secor v. Singleton*, 41 Fed. 725; *Root v. Woolworth*, 150 U. S. 402-411, 37 L. ed. 1124-1126, 14 Sup. Ct. Rep. 136; *French v. Hay* (*French v. Stewart*) 22 Wall. 246, 22 L. ed. 856; *Milwaukee R. Co. v. Milwaukee & St. P. R. Co.* (*Milwaukee & M. R. Co. v. Soutter*) 2 Wall. 634, 17 L. ed. 895.

In *Root v. Woolworth*, 150 U. S. 402-411, 37 L. ed. 1124-1126, 14 Sup. Ct. Rep. 136, it is decided that when the title of the original party is determined, but another party becomes interested in the subject-matter through a title not derived from the original party, but in such manner as to render it just that this second party should have the benefit of the prior proceedings then such party can file a bill in the nature of a supplemental bill, to be discussed hereafter.

When one seeks to modify the decree, on the ground of newly discovered evidence, then a supplemental bill in the nature of a bill of review can be filed, but it must show definitely that the facts set up were not known prior to the entry of the decree. *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 6; *Henry v. Travelers' Ins. Co.* 45 Fed. 299-303. Again, supplemental bills are proper to obtain restraining orders to protect decrees of courts, as where parties attempt to nullify in a State court a decree of a Federal court foreclosing a mortgage.

*Motion to File Supplemental Bill.*

Equity rule 57 further requires that before either character of supplemental bill can be filed, you must obtain consent of the court through a motion to file it, with due notice to the other party showing proper cause. The motion is intended to advise the defendant of the ground upon which the bill is based, and to advise the court that probable cause exists for granting the motion, and that the matter embraced in the motion, if properly pleaded, would sustain the supplemental bill. The motion must show that the event upon which it is founded occurred after the filing of the bill (*Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 489); or if the fact existed before that, it was not known, or could not by reasonable diligence have been known (*Mosgrove v. Kountze*, 4 *McCrary*, 561, 14 Fed. 315; *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 6; *Henry v. Travelers' Ins. Co.* 45 Fed. 303), or through misapprehension, or some excusable cause, he was prevented from setting it up.

The following form is sufficient:

Title as in bill, and address.

The motion (or petition) of A. B. respectfully shows that on the..... day of.....A. D. 19... he filed his bill in this Honorable Court against C. D., defendant, for the purpose of (state object of bill) and plaintiff prayed in said bill as follows (state prayer of bill).

Plaintiff shows that the defendant appeared and answered (state substance of answer or so much as will show the relevancy of the supplement to be filed) or did not answer. That since the filing of the suit (here state what has occurred since upon which the supplement rests).

Wherefore your petitioner is advised that it is necessary to bring in C. H. as a party to the suit (or whatever is sought in the supplemental bill), and your petitioner prays that leave be granted to file a supplemental bill against C. H. for the purpose of making him a party and for such general and special relief as may be proper.

R. F.,  
Solicitor.

Leave must be obtained to file (*Henry v. Travelers' Ins. Co.* 45 Fed. 303) and the motion may be filed at any stage of the cause (*Secor v. Singleton*, 41 Fed. 726); but the granting of it is entirely in the discretion of the court (*Mackintosh v. Flint & P. M. R. Co.* 34 Fed. 614; *Sheffield & B. Coal, Iron*



& R. Co. v. Newman, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; Berliner Gramophone Co. v. Seaman, 51 C. C. A. 440, 113 Fed. 750).

In determining the motion, the court does not proceed to try the case on the motion, or determine questions that could be raised by demurrer to the bill, but will ordinarily grant the filing, though grave doubts may exist as to the relief prayed for. Oregon & Transcontinental Co. v. Northern P. R. Co. 32 Fed. 428.

### *Notice of Motion.*

Equity rule 57 provides that leave to file the bill may be granted on any rule day, and in giving notice of the motion you must fix in it the rule day on which you will make the application, but you should add "or as soon thereafter as possible," so as to provide for the contingency that the judge may not be reached on the day you set for the hearing.

The form of notice is as follows:

Title as in bill.

*To Messrs....., Solicitors for Defendant, etc.:*

You will please take notice that I will present to his Honor....., Judge of the Circuit Court of the United States for the.....District of....., on the.....day of .....A. D. 19..., being the rule day in.....(state month), or as soon thereafter as practicable, a motion, a copy of which is hereto attached, praying for permission to file a supplemental bill (or a bill in the nature of a supplemental bill) in the above cause and upon the grounds therein stated.

R. F.,  
Solicitor, etc.

This notice may be served by an officer or sent by a clerk, and it is usual for counsel to indorse acceptance of service, but if not, the officer serving may make his return of service as usual, or if served by one not an officer, he may make affidavit of the delivery to counsel on the notice as follows:

State of.....,

County of.....

On the.....day of....., A. D. 19..., I served the within notice on X. Y., solicitor of record for the defendant, by handing him a copy of .....(or leaving it at his place of business or residence).

(Signed) JOHN SMITH.

Sworn to before me S. M., a notary public in and for.....County,  
in the State of....., this the.....day of.....A. D. 19...

[SEAL.]

.....

Notary.

Equity rule 58 provides that it shall not be necessary to set forth in a supplemental bill any of the statements in the original bill, unless special circumstances require it. The supplemental bill as stated is only a continuation of the original suit, and it should set forth as much of the original pleadings as is necessary to clearly show the relevancy of the supplement, or the new matter sought to be introduced; that is, the change of interest of the parties and how the subject-matter is affected thereby.

### *Parties.*

If a new party is made, then show his interest in the subject-matter and that he is entitled to a decree, and is further entitled to the benefit of the prior proceedings, or, if a defendant, that his presence is necessary to perfect the relief sought in the suit.

The parties to the bill depend on the purpose. Ordinarily the parties to the original bill are parties to the supplement, but when change of interest only occurs in one defendant, then a supplemental bill may be exhibited against him alone, and also when the purpose is only to make formal parties, then you need only make them parties to the supplemental bill.

In this character of bill, questions of citizenship do not affect jurisdiction, as it is only auxiliary to the principal suit. *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Miller v. Rogers*, 29 Fed. 401.

### *Process.*

Again, if the matter of supplement does not require new parties to be made, then there is no necessity for further process. *Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333. You may direct a rule to the parties already served to answer. *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 329; but see *French v. Hay* (*French v. Stewart*) 22 Wall. 246, 247, 22 L. ed. 856, 857, holding new process necessary, unless waived.

## CHAPTER LXIII.

### RELATION OF SUPPLEMENTAL TO ORIGINAL BILL.

The supplement is only a continuation of the original bill, and the facts set up must have a near relation to the original bill, and the relief sought must be a modification or enlargement of the original relief sought, *Maynard v. Green*, 30 Fed. 645. And the facts in the supplement must not contradict the facts in the original bill. (*Ibid.*; *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 606), but must further the object (*Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333). If it has no connection with the original bill, it should be dismissed. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co.* 6 Wall. 742, 18 L. ed. 856.

You cannot make new case by supplement (*Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607), or pray for relief manifestly inconsistent with original prayer (*Ibid.*)

Again, if there is no cause of action in the original bill, it will not support a supplement stating a cause of action. *Putney v. Whitmire*, 66 Fed. 385.

If the supplemental bill be brought to set up new matter it must further appear that it was filed as soon as practicable after the discovery. *Henry v. Travelers' Ins. Co.* 45 Fed. 303; *Omaha v. Redick*, 11 C. C. A. 1, 27 U. S. App. 204, 63 Fed. 1; *Mosgrove v. Kountze*, 4 McCrary, 561, 14 Fed. 315. A supplemental bill setting up documents *in hæc verba* will not be expunged if material. (*Nevada Nickel Syndicate Co. v. National Nickel Co.* 86 Fed. 488; equity rule 57), but repetitions will be. (*Ibid.*)

### *Form of Supplemental Bill.*

Title and address as in bill.

That on the.....day of....., A. D. 19..., plaintiff exhibited his original bill of complaint in this Honorable Court against C. D. defend-

ant (state purpose of bill and prayer). That said defendant was duly served with process and entered an appearance and put in his answer (here state the stage the case has reached). That on the.....day of....., A. D. 19..., C. D. was declared a bankrupt and that E. F. was chosen assignee of the estate of C. D., all of which has been duly conveyed and assigned to the said E. F., and plaintiff is advised that he is entitled to the same relief against the said E. F., as he would have been entitled to if C. D. had not become a bankrupt.

To the end, therefore, that the defendant E. F. may show why the plaintiff may not have the relief prayed for, and may answer under oath fully and truly to all the matters herein stated as if particularly interrogated thereto, and that the plaintiff may have the same relief against E. F. as he would have been entitled to against the said C. D. had he not become a bankrupt and that plaintiff may have such other further general and special relief as the facts of the case entitle him to, may it please Your Honor to grant to plaintiff a writ of subpoena directed to the said E. F., commanding to appear and make answer to the premises and abide by and perform such orders and decrees as to the court may seem proper.

R. F.,  
Solicitor.

(Affidavit to Bill.)'

United States of America,  
.....District of.....

On this the.....day of....., A. D. 19..., came A. B., the above named plaintiff, who made oath that he has read the foregoing bill of complaint and knows the contents thereof and the same are true.

J. N.,  
Notary Public.

The prayer of the bill may pray for a subpoena to the end that the defendant may answer the new supplemental matter, and the court to grant further relief based on the supplemental statements. Or if the defect arises from a change of parties a subpoena is prayed against the new parties to the end that they may answer the premises, and the plaintiff have the benefit of the former proceedings, and the same relief he would have been entitled to against the former parties.

When the bill is filed, the same procedure is had as in filing the original bill. The defendant must demur, answer, or plead to the supplemental bill by the next rule day after filing the supplement in the clerk's office, unless the court enlarges the time (equity rule 57), or the bill will be taken as confessed.

## CHAPTER LXIV.

### BILL IN NATURE OF SUPPLEMENTAL BILL.

It will be noticed that equity rule 57 provides not only for a supplemental bill, but for a bill in the nature of a supplemental bill "as may be necessary to be filed," which means, as the facts may demand. Judges of the Federal courts often speak of the two classes of bills as if the distinction was only artificial, but there is a marked difference. *Curtis Davis & Co. v. Smith*, 105 Fed. 950; *Campbell v. New York*, 35 Fed. 14; *Vigneron v. Auto Time Saver Repair Kit Co.* 171 Fed. 581; *Ross v. Ft. Wayne*, 58 Fed. 404, reversed in 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 466.

It has already been stated that pure supplemental bills are but continuations of the original bill, and used as amendatory process to cure matters which render the original bill defective; but a bill in the nature of a supplemental bill is in effect an original bill, beginning, as it were, a new suit, which simply draws to itself the advantages of the proceedings under the original bill and to that extent is supplementary. *Ibid.*

To illustrate: When the property which is the subject-matter of the suit has been entirely transferred by a sole plaintiff or sole defendant, or by all the plaintiffs or defendants, to a third person, or if the title has passed by death and transferred to another, then a bill in the nature of a supplemental bill should be filed (*Nevada Nickel Syndicate v. National Nickel Co.* 86 Fed. 489; *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 325; *Secor v. Singleton*, 41 Fed. 725; *Walter Baker & Co. v. Baker*, 89 Fed. 673; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123, 14 Sup. Ct. Rep. 136; *Miller v. Rogers*, 29 Fed. 401), because the parties in these cases are out of court for want of interest; the suit is virtually ended, and the court cannot enter a decree, nor can it be continued by revivor, or a pure supplemental bill for or against the new party. *Ibid.*

Again, suppose the interest is cut off by death, and the property in dispute transferred to a third person who does not hold in the same right as the deceased party; it cannot be continued by pure supplemental bill because he comes in by a different right and by a title that might be litigated, as, when property is cut off by bankruptcy. *Hazleton Tripod-Boiler Co. v. Citizens Street R. Co.* 72 Fed. 328; *Chester v. Life Asso. of America*, 4 Fed. 487; *Miller v. Rogers*, 29 Fed. 401. It would not be enough that the new party states that his assignor instituted suit and assigned to him, or that suit was instituted by the deceased and his interest arose by reason of the death, etc., as would be sufficient in a pure supplemental bill, but he must show that his assignor had the property, and the manner in which he had acquired the property carried with it the right to sue. *Foster*, Eq. Pr. Sec. 190. This requires an original bill and supplementary only so far as advantage may be taken of the prior proceedings.

A bill in the nature of a supplemental bill must, however, follow the general purpose of the original bill and be in accord with the tenor of its allegations. *Electrical Accumulator Co. v. Brush Electric Co.* 44 Fed. 607. It must set forth so much of the original bill or answer as shows how the interest of the original party has terminated, and the circumstances under which the new party can claim the benefit of the prior proceedings, and it must show a cause of action against the original defendants, and be in form an original bill.

It has been held, however, that if a supplemental bill has been filed, when the remedy should have been sought through a bill in the nature of a supplemental bill, and no objection is raised to the irregularity, the court will disregard it and proceed on the supplemental bill. *Reedy v. Scott*, 23 Wall. 352, 23 L. ed. 109; see *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 196, 34 L. ed. 876, 11 Sup. Ct. Rep. 258.

Again, if a party defendant dies before appearance, or, having appeared, dies before answer, plea, or demurrer, and before a judgment *pro confesso* has been taken, his successor must be brought in by a bill in the nature of a supplemental bill. There is some confusion on the subject of making new parties when a purchase has been made *pendente lite*.

A distinction has been drawn where the plaintiff sells and

where the defendant sells. Thus it is held that when the defendant sells, his purchaser is bound by the decree, and it is not necessary to file a supplemental bill; but when the plaintiff sells, there can be no decree, and the purchaser must be brought before the court by an original bill in the nature of a supplemental bill. *Hazleton Co. v. Citizens' Street R. Co.* 72 Fed. 329; *Walter Baker & Co. v. Baker*, 89 Fed. 675.

In *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 328, 329, the court recognizes the distinction between privies in law and privies in deed, and holds that if the new party obtains the interest by transfer he must file an original bill in the nature of a supplemental bill, but the interest of an administrator or heir at law may be set up by a pure supplemental bill. As to forms of notice, motion, service, and bill see forms under supplemental bills.

## CHAPTER LXV.

### BILL OF REVIVOR.

Equity rule 56 provides that whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts subpoena shall issue to the proper representatives to appear and show cause why the suit shall not revive, and if no cause be shown at the next rule day occurring fourteen days from the service of process, the suit shall stand revived as of course. Revivor must be by bill, not by motion. *Dillard v. Central Virginia Iron Co.* 125 Fed. 158; *Simmons v. Morris*, 109 Fed. 707.

By equity rule 58 it is provided that it shall not be necessary to set forth any of the statements in the original suit, unless the special circumstances of the case require it.

By U. S. Rev. Stat. sec. 955, U. S. Comp. Stat. 1901, p. 697, it is provided that when either of the parties plaintiff or defendant die before final judgment the executor or administrator may, if the suit survives, prosecute or defend to final judgment \* \* \*. If the executor or administrator refuses or neglects to become a party twenty days after being served by scire facias, the court may nevertheless render judgment against the deceased party. The executor or administrator becoming a party is entitled to a continuance. This section, however, has reference to a cause wherein a sole plaintiff or defendant dies. See *Allen v. Fairbanks*, 40 Fed. 188; *Spaeth v. Sells*, 176 Fed. 797. See also *Thomas v. Tensas Parish*, 14 Fed. 390, and note.

By U. S. Rev. Stat. Sec. 956, it is provided that when one of several plaintiffs or defendants die in an action which sur-



vives to or against the other, the writ or action shall not abate, but upon suggestion on the record the action shall proceed in favor of or against the surviving party.

We thus see at a glance the rules of equity and Federal statutes controlling the revival of suits in Federal courts. There is nothing inconsistent in the equity rules and statutes; the former provides how the suggestion of death and subsequent revival is to be made, which must be followed in equity causes (*Fitzpatrick v. Domingo*, 4 Woods, 163, 14 Fed. 216), as section 955 does not apply to Equity suits. *Brown v. Fletcher*, 140 Fed. 642.

### *Nature Of.*

A bill of revivor is a continuation of the original suit. *Hone v. Dillon*, 29 Fed. 465; *Newcombe v. Murray*, 77 Fed. 493; *Clarke v. Mathewson*, 12 Pet. 164, 9 L. ed. 1041; *Terry v. Sharon*, 131 U. S. 48, 33 L. ed. 96, 9 Sup. Ct. Rep. 705. And to revive by simple bill certain conditions must exist. The suit must involve an interest that survives death; that is, it must pass by operation of law to the legal representative, such as an executor or administrator, or by priority in blood to the heirs at law of the deceased. If the interest is cut off by death or passed by will, then a bill of revivor does not lie, but it must be revived by supplemental bill in the nature of a bill of revivor. *Chester v. Life Asso. of America*, 4 Fed. 489.

### *Parties.*

The rule requires the bill to be filed by the proper parties. *Terry v. Sharon*, 131 U. S. 46, 33 L. ed. 95, 9 Sup. Ct. Rep. 705. The sole question in a simple bill of revivor is the competency of the parties and the proper frame of the bill. *Ibid.*; *Newcombe v. Murray*, 77 Fed. 493; *Fretz v. Stover*, 22 Wall. 198-204, 22 L. ed. 769-771. It is a matter of right where the conditions exist (*Fitzpatrick v. Domingo*, 4 Woods, 163, 14 Fed. 216; *Howth v. Owens*, 30 Fed. 911), but not after an order dismissing the suit (*Ibid.*).

*When Sole Plaintiff Dies.*

When the sole plaintiff dies, the executor or administrator must revive, or if there be no necessity for administration, then the heirs and all the defendants in the original bill must be made parties to the bill of revivor. *Newcombe v. Murray*, 77 Fed. 493; *Simmons v. Morris*, 109 Fed. 707.

*When Sole Defendant Dies.*

If the sole defendant dies it must be revived against the executor or administrator by all the plaintiffs. *Kirk v. DuBois*, 28 Fed. 460; *Childs v. Ferguson*, 181 Fed. 795.

*When Several Plaintiffs and One Die.*

If there be several plaintiffs, and one die, the suit may be revived by the representatives of the deceased party, or by one or all of the surviving plaintiffs. If any of the surviving plaintiffs refuse to join in a bill of revivor, you can make the parties refusing to join defendants in the bill. U. S. Rev. Stat. Sec. 955, U. S. Comp. Stat. 1901, p. 697; *Spaeth v. Sells*, 176 Fed. 797.

*One of Several Defendants Dies.*

When one of several defendants dies, the suit abates as to him, and you may proceed without him, unless he is an indispensable party, in which event the representative of the deceased must be made a party to a bill of revivor which may be filed by any one of the plaintiffs in the original bill.

When one of several plaintiffs, or one of several defendants dies, and the interest of the deceased passes to the coplaintiffs or codefendants, then there is no necessity for a revival, as in cases where a husband joined with the wife *pro forma* dies, or where there are several executors or trustees, and one dies.

In making parties to a bill of revivor, or in the nature of a bill of revivor, the fact that the new parties to be made destroys diversity of citizenship does not affect the jurisdiction of the

court. Being only a continuation of the old suit, of which the court had jurisdiction, a subsequent change of situation cannot affect it. *Clarke v. Mathewson*, 12 Pet. 171, 9 L. ed. 1043; *Hone v. Dillon*, 29 Fed. 465.

*When Bill Will Be Dismissed.*

It is no ground to dismiss the bill that the original bill does not show a cause of action; the bill, though demurrable, cannot be tried in this manner; the only question as to the revivor is the cause of action to one that survives. *Allen v. Fairbanks*, 40 Fed. 188; *Mason v. Hartford, P. & F. R. Co.* 19 Fed. 56; *Fretz v. Stover*, 22 Wall. 198, 22 L. ed. 769. But if the court has no jurisdiction of the original bill, then a demurrer to a bill of revivor would be good. *Sharon v. Terry*, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; *Rutledge v. Waldo*, 94 Fed. 265. The defendant opposing revival must do so by demurrer, plea, or answer, *viz.*; a demurrer when sufficient cause for revival is not shown; by plea when a ground to prevent revival exists, but does not appear; and by answer when the facts set up in the bill are not true; but remember cause must be shown at the next rule day which shall occur fourteen days after the service of the subpoena to show cause. Equity rule 56.

*Revival By the Defendant.*

The defendant cannot revive a suit before decree, nor can he make the plaintiffs revive (*Chester v. Life Asso. of America*, *supra*), but he is entitled, when cause for revival arises, to have the representative of the deceased sole plaintiff, or surviving plaintiffs when more than one, to revive within a given time or the suit be dismissed. Or should it appear that the facts exist when a bill in the nature of a bill of revivor is necessary, the defendant may demand that the proceeding be taken in a limited time or the bill be dismissed.

To illustrate: If the interest of the plaintiff has been terminated by death, as in a life estate, or if a transfer has been made by will, or if plaintiff has become bankrupt, in either of these cases the defendant may demand action to be taken.

*When Filed.*

A bill of revivor, or in the nature of a bill of revivor, must be filed within a reasonable time, or defendant may move to dismiss. *Howth v. Owens*, 30 Fed. 910; *Hubbell v. Lankenau*, 63 Fed. 881. The bill may be filed at any time during the progress of the cause in the clerk's office, either before or after the decree (*Terry v. Sharon*, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705; equity rule 56), and it must suggest the facts upon which the revival is sought as a basis for subpœna to the representatives of the deceased to show cause why the suit should not be revived, and the subpœna is issued by the clerk as of course. *Ibid.*

*Other Causes for Revival.*

Equity rule 56 provides that revival lies when abatement is caused by death or "any other event." The words "any other event" refers to abatement caused by the marriage of a female party to the original bill. The suit must be revived in her new name, and her husband made a party. However, a female defendant marrying does not abate the suit, but upon simple suggestion entered in the record you may proceed with the cause, waiving her husband in any further proceedings.

Again, equity rule 56 provides for a simple bill of revivor, or a bill in the nature of a bill of revivor, "when the circumstances require it." This means, when the circumstances show that the interest of the deceased party ceases at death, as when the deceased party was litigating a contingent interest; or when the interest of the deceased has been transferred by will to a third party; or in case where after death the interest of the deceased party would not pass to the administrator or heir; or where a sole party is suing in a representative capacity; or where the defendant dies before service or appearance; or where he dies after appearance, but before a decree *pro confesso*. In any of these events a simple bill of revivor would not lie, but a bill in the nature of a bill of revivor or supplement must be filed.

It is seen that the conditions supporting the two character of bills are similar to the conditions necessary to filing supple-

mental bills, or bills in the nature of supplemental bills, and the same reason and authorities apply.

The distinction frequently laid down in the cases between personal and real property as determining whether the administrator or heir should revive, or be made parties defendant, does not apply in Texas. If the estate is being administered, the statutes of Texas determine who shall be made parties. See Texas Rev. Stat. 1201, 1246, 1409, 2272.

*What Must Be Alleged.*

Equity rule 58 provides that the bill of revivor need not set forth any of the matters of the original bill, unless the circumstances require it. The bill should simply set forth the pendency of the suit and the proceedings had, the cause of abatement and the proper parties to represent the deceased if abated by death. If abated by marriage, then the fact of marriage is the only question to be inquired into. Then there must always be a prayer for process of subpoena to the parties to be served to show cause why the suit should not be revived.

You cannot incorporate new matter in the bill to revive. *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 334. These are the usual allegations in a simple bill of revivor, but if the bill be one in the nature of a bill of revivor you must, in addition to the above features, set forth so much of the original bill as shows the interest of the deceased, the manner the interest has been transferred to the third party, the validity of the transfer, and the rights accruing under it.

The prayer of the bill is for subpoena to the proper parties to show cause against revival, except that if the answer has been filed the subpoena merely requires cause to be shown; but if defendant dies before answer, then the prayer must be for answer, and the subpoena framed accordingly.

If no objection is filed by the next rule day occurring fourteen days after service of subpoena, then the suit stands revived as of course, and the order of revival must be prepared and entered when the suit shall proceed. After being thus revived all the evidence can be used that has been taken, if it could have been used before abatement. *Vattier v. Hinde*, 7 Pet. 252, 8 L. ed. 675.

After the suit has abated, and before revival, no order can be taken, except such orders as may be necessary to the preservation of the property, or enforcing contempt for disobeying an injunction, or the performance of an act previously ordered by the court when all parties to the suit were before it.

### *Form of Bill.*

I will now give the outlines of a bill of revivor which may be perfected according to the circumstances of your case, and by observing the rules heretofore given:

Title and address as in original bill.

That A. B., late of....., but now deceased, on the.....day of....., A. D. 19..., exhibited his original bill of complaint in this court against C. D., defendant therein, stating (here state purpose of bill), and praying (here state prayer of bill). That defendant C. D. was duly served with process, appeared and answered the bill (if such was fact).

That on the.....day of....., A. D. 19..., A. B. departed this life intestate (or having made his last will and testament naming therein L. N. as executor, who has duly qualified under said will), and G. H. was duly made administrator, and has taken out letters of administration as required by law. That the suit has become abated by the death of A. B. and the plaintiff is entitled to have the said proceedings revived against said defendants (naming them).

To the end, therefore, that the said defendants may show cause why the said suit and proceedings heretofore had may not stand revived, may it please the court to grant to the plaintiff a writ of subpœna to revive (and answer if death occurred before answer), directed to the said defendants (naming them), commanding them to appear before this court by the..... day of....., A. D. 19..., being the rule day in the month of....., then and there to show cause why the said suit should not be revived against him (or them), and to abide such further order as to the court may seem proper.

R. F.,  
Solicitor.

### *Revival After Decree.*

Equity rule 56: The bill may be filed after decree (Terry v. Sharon, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705; Sharon v. Terry, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 337; Shainwald v. Lewis, 69 Fed. 493, 494), and defendant may show court had no jurisdiction to enter the decree. (Rutledge v. Waldo, 94 Fed. 265).

## CHAPTER LXVI.

### DECREE PRO CONFESSO.

Having discussed the character of bills that a plaintiff may be called upon to file at various stages of the case in order to perfect it for hearing, and having discussed the process by which the defendants are brought into court to answer, I will now proceed to show the effect of a failure of defendant to respond to the subpoena by entering an appearance or pleading to the bill.

Equity rule 18 provides that it shall be the duty of the defendant, unless the time shall be further enlarged for cause shown, to file a demurrer, plea, or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance. In default thereof the plaintiff may at his election enter an order (as of course) in the order book that the bill be taken as confessed and thereupon the cause shall proceed *ex parte*, and the matter may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed; or, if the plaintiff requires any answer or discovery to enable him to obtain a proper decree, he shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not be discharged from the attachment until he answers or otherwise complies with the orders directed by the court, as to pleading or fully answering the bill within the time fixed by the court.

By equity rule 12 the clerk is required to place at the bottom of the subpoena a memorandum that the defendant is to enter an appearance in the suit at the clerk's office on or before the day the writ is returnable, otherwise the bill may be taken as confessed.

Equity rule 19 provides that when the bill is taken as con-

fessed the court may proceed to a decree any time after thirty days from and after an entry of an order taking the bill as confessed, and such decree shall be considered absolute, unless the court shall at the same term set aside the decree or enlarge the time for filing the answer on cause shown by motion and affidavit of defendant. *Third Nat. Bank v. Atlantic City*, 65 C. C. A. 177, 130 Fed. 753, 754; *Thomson v. Wooster*, 114 U. S. 114, 29 L. ed. 108, 5 Sup. Ct. Rep. 788.

*When Pro Confesso Can Be Taken.*

We thus see under these rules a decree *pro confesso* can be taken either upon failure to enter an appearance, or, having entered an appearance, upon failure to demur, plead, or answer on the rule day next succeeding the rule day upon which an appearance should have been entered; and a demurrer or plea to prevent the decree *pro confesso* from being taken must have both the certificate of counsel that it is well taken in law, and the affidavit of the defendant that it is not interposed for delay. *Sheffield Furnace Co. v. Witherow*, 149 U. S. 576, 37 L. ed. 855, 13 Sup. Ct. Rep. 936; *Preston v. Finley*, 72 Fed. 853; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 598. Where, however, there is a failure to plead, demur, or answer, *pro confesso* cannot be taken if the allegations of the bill would not support a decree. *Wong Him v. Callahan*, 119 Fed. 381; *Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376.

There has been some conflict of opinion as to when the decree *nisi* could be entered, because of the language of equity rules 12 and 18, stating different periods in the progress of the cause when it can be taken.

Under the English practice, followed in this country until 1822, a bill could not be taken as confessed until all the processes for contempt had been exhausted. See equity rules 6 and 7.

The Supreme Court of the United States in 1822 changed this practice, and gave three months after appearance day, after which the defendant was ruled to answer, and, failing to do



so, the bill was taken as confessed and the matter decreed immediately, to be followed by a final decree at the next succeeding term after the service of the "decree *nisi*" on the defendant *Bank of United States v. White*, 8 Pet. 262, 8 L. ed. 938.

In 1842 equity rules 18 and 19 were promulgated, modifying the rule of 1822 in the interest of greater expedition in chancery cases, by requiring the demurrer, plea, or answer to be filed by the rule day next after entering an appearance, or the bill should be taken as confessed.

In *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840, the old and new rules are compared, and the inference may be drawn that a *pro confesso* order should not be made in default of appearance only. *Fellows v. Hall*, 3 McLean, 281, 487, Fed. Cas. Nos. 4,722, 4,723; *Schofield v. Horse Springs Cattle Co.* 65 Fed. 436. In *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788, Justice Bradley says that by the rules of the Federal court a bill may be taken as confessed:

First. When defendant fails to enter an appearance within the time required.

Second. When he appears, but fails to answer at the next succeeding rule day thereafter. See *Berlinger Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 752.

Equity rules 18 and 19, which specifically control the practice in entering decrees *pro confesso*, would not, taken alone, justify the conclusion of the court, but taken in connection with equity rule 12, requiring the entry of appearance on or before the day the subpoena is returnable, the rule laid down in *Thomson v. Wooster* is the true practice. *O'Hara v. MacConnell*, 93 U. S. 153, 23 L. ed. 842.

But there are other stages in the cause when decrees *pro confesso* can be entered.

By equity rule 34 it is provided that if upon hearing a demurrer or plea the same be overruled, and the defendant assigned to answer further, either to the whole bill or so much of it as is covered by the demurrer or plea, then, in default of an answer within the time fixed by the court, the plaintiff can enter a decree *pro confesso*, either to the whole bill or so much thereof as required a further answer.

Again, if the defendant in answering fails to answer a ma-  
S. Eq.—25.

terial allegation a decree *pro confesso* may be entered to so much thereof not answered. *Hale v. Continental L. Ins. Co.* 20 Fed. 344.

Again, by equity rule 64, where exceptions to an answer are allowed, the defendant must put in a full answer, and, upon failure to do so, the bill can be taken as confessed and an order entered accordingly. *Ibid.*

So again, by equity rule 47 when the bill is amended after answer, defendant is required to file a new or supplemental answer by the next rule day, and upon failure to do so, a decree *pro confesso* can be taken on the amended bill, or so much thereof as is amended and not answered.

So the decree can be taken against any one or more of several defendants defaulting. *Frow v. De La Vega*, 15 Wall. 554, 21 L. ed. 61; *Lockhart v. Horn*, 3 Woods, 548, Fed. Cas. No. 8,446. So a decree *pro confesso* can be entered on a cross bill if not answered under the rules. *Blythe v. Hinckley*, 84 Fed. 228.

### *Order to Take Bill As Confessed.*

Equity rule 18 provides that the plaintiff may at his election enter an order (as of course) taking the bill as confessed. This order must be entered in the order book in the clerk's office, and you may use the following form:

Title as in bill.

The subpoena in the above entitled cause having been returned, which return has been filed, and it appearing therefrom that the said subpoena was duly served on C. D., the defendant herein, and no appearance having been entered by or for said defendant, nor any demurrer, plea, or answer filed, although such appearance should have been entered (or such demurrer, plea or answer should have been filed), on or before the.....day of....., A. D. 19..., the same being the proper rule day (or the time appointed by the judge), therefore, on motion of R. F., solicitor for plaintiff, it is ordered and decreed that bill be taken as confessed as to the said C. D. defendant.

Date.....

If the defendant has entered an appearance, but failed to plead answer or demur within or by the rule day next suc-

ceeding the entry of appearance, then let the order so recite. The decree to be subsequently entered must follow the order and a proper basis for the *pro confesso* must be shown.

Equity rule 19 further provides that when the bill is taken as confessed, the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*; and equity rule 18 provides that when the order is entered, the cause shall proceed *ex parte*, and the matter of the bill be decreed by the court at any time after thirty days, if proper to be decreed.

The following form for a decree *pro confesso* may be used:

Title as in bill.

It appearing to the court that the bill in the above cause was filed in this court on the.....day of....., A. D. 19..., and that subpoena was duly issued and served on the defendant herein, and that no appearance has been entered by C. D., the defendant herein (or if an appearance has been entered, but no answer, plea, or demurrer has been filed, so state following the order entered in order book), and that an order taking the bill as confessed was duly entered in the order book on the.....day of..... A. D. 19..., in the office of the clerk of this court, and no proceeding has been taken by the defendant since the entry of said order, and more than thirty days have elapsed since entering the order *pro confesso*. It is hereby ordered, adjudged, and decreed (insert decree).

### *Serving Notice of the Decree.*

The question has arisen whether notice of the decree should be served on defendant. In *Thomson v. Wooster*, 114 U. S. 114, 29 L. ed. 108, 5 Sup. Ct. Rep. 788, the court leaves it an open question, and in *Austin v. Riley*, 55 Fed. 833, the court calls attention to the fact that it is an open question, but seems to think it is not necessary.

In *Southern P. R. Co. v. Temple*, 59 Fed. 17, the court was of opinion that where the defendant appeared by his solicitor, but failed to answer, then notice should be served on the defendant, as the defendant should be heard on the form and extent of the decree. The court bases its conclusion on *Bennett v. Hoefner*, 17 Blatchf. 341, Fed. Cas. No. 1,320, and *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788, wherein it is held that a final decree after the

bill has been taken as confessed is not a decree as of course. I do not think a proper construction of the rule requires notice of the entry of the final decree to be given.

Taking into consideration the English practice and the practice of the Federal courts prior to 1842, and the defects sought to be remedied by equity rules 18 and 19, I conclude that the words *ex parte* used in the rule, applied to proceedings after the bill is taken as confessed, were intended to cut off any further appearance of the defendant, or action on his part affecting the subject-matter of the bill, and notice of any character would therefore be an unjustifiable increase of costs. *Austin v. Riley*, 55 Fed. 833; *Provident Life & T. Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 854.

In *Frow v. De La Vega*, 15 Wall. 552, 21 L. ed. 60, the court construes *ex parte* to mean, that the defendant is not entitled to service of notice in the cause, nor to appear in it in any way. He can adduce no evidence nor be heard at the final hearing. *Clason v. Morris*, 10 Johns. 524.

In *Romaine v. Union Ins. Co.* 28 Fed. 632, the court says that now, instead of seeking to compel an appearance as under the old practice, the present rule prescribes a penalty for non-appearance by proceeding *ex parte* on the *pro confesso* decree.

### *Is Proof Necessary Before Entering Final Decree?*

Closely connected with the *quære* above discussed is the question: Must you offer proof of the allegations of your bill before you can enter the final decree, and, if so, can the defendant then appear and rebut the proof?

If the allegations of the bill are sufficient to support the decree asked, the court will enter the final decree on the *pro confesso* order without further proof (*Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 91, 33 L. ed. 563, 10 Sup. Ct. Rep. 235); that is, if the allegations of the bill can be decreed without further discovery, the statements in the bill will be acted on as if true. (*Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788.)

### *Effect of the Final Decree.*

When a final decree is entered, which is warranted by the

bill, it has the same effect as if the defendant had appeared and contested it (*Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 756, 757, 31 L. ed. 313, 8 Sup. Ct. Rep. 337), and failing to enter an order *pro confesso* does not affect it. *Allen v. New York*, 18 Blatchf. 239, 7 Fed. 483; *Linder v. Lewis*, 1 Fed. 378.

### *Can Defendant Offer Proof.*

The decisions, as we have seen, clearly contemplate that if the bill is complete and the matter can be decreed without further discovery, such as an accounting, then the defendant cannot resist. But suppose a discovery or accounting is necessary to a complete decree, or proof necessary to cure a defective allegation, such as uncertainty, can the defendant, as a matter of right, then appear and rebut plaintiff's proof before the court or master to whom it may be sent to state an account or ascertain some other fact necessary to a decree?

Under the English practice and the equity rule of 1822, controlling this matter, the defendant was permitted to appear before the master if the cause was submitted to him to take evidence, but these rules prior to 1842 did not contain the word *ex parte*. This *ex parte* clause of the rule of 1842 clearly cuts off the right of defendant to appear, and any interference by him between the order *pro confesso* and final decree. *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Lockhart v. Horn*, 3 Woods, 542, Fed. Cas. No. 8,446. He loses his standing in court. *Frow v. De La Vega*, 15 Wall. 554, 21 L. ed. 61. And permitting him to be heard would be a mere act of favor. *Provident Life & T. Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 854.

### *Final Decree Not Matter of Course.*

While it may be said that defendant is closed out from any intervention or interference between the order *pro confesso* and final decree, yet it must not be understood that plaintiff is entitled to a final decree as a matter of course.

The rule requires the matter of the bill to be decreed by the court, and the practi  
bill for *hearing* on

the order *pro confesso*, and the matter of decree is then in the discretion of the court. *Andrews v. Cole*, 22 Blatchf. 184, 20 Fed. 410, 411. Where the defendant has appeared, but not answered, he can be heard on the form and extent of the decree. *Southern P. R. Co. v. Temple*, 59 Fed. 17; *Webster v. Oliver Ditson Co.* 171 Fed. 895.

### *Compelling to Answer.*

By equity rule 18, if the plaintiff requires a discovery or answer after the order *pro confesso* has been entered, in order to obtain a proper decree, he shall be entitled to process of attachment against the defendant to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom unless upon filing answer or otherwise complying with the order of court.

### *Rights of Defendant After Default in Appearing.*

The rights of defendant to further participate in the proceedings after he has failed to appear, or, having appeared, has failed to answer, are as follows:

First. By equity rule 32, as long as the plaintiff fails to enter the *pro confesso* order, he may appear at any time and plead, answer, or demurrer.

Second. After the order *pro confesso* has been entered, and before final decree the defendant may, on motion showing cause, obtain leave of the court to demur, plead, or answer. *French v. Hay (French v. Stewart)* 22 Wall. 238, 22 L. ed. 854; *Southern P. R. Co. v. Temple*, 59 Fed. 18.

Third. By equity rule 19 after the final decree has been entered, the defendant may at the *same term*, but not afterwards, appear by motion supported by affidavit showing cause, and have the decree set aside, or have the time extended to answer, but the payment of costs, or such part thereof as the court may require, and filing answer within such time as the court may fix, are conditions precedent. The matter is entirely within the discretion of the court. *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378; *Southern P. R. Co. v. Temple*, 59 Fed. 18.

Fourth. After the term in which the final decree has been entered, the court has no power to set aside the decree and reopen the case. Equity rules 19 and 88; *Stuart v. St. Paul*, 63 Fed. 644; *Linder v. Lewis*, 1 Fed. 378; *Cammeyer v. Durham House Drainage Co.* 35 Fed. 52; *Austin v. Riley*, 55 Fed. 833; *Thomson v. Wooster*, 114 U. S. 104, 29 L. ed. 105, 5 Sup. Ct. Rep. 788; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530; *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799; *Allen v. Wilson*, 21 Fed. 881. See "Vacating Decrees."

Under such conditions the only remedy left to the defendant is an appeal, and he will be confined to the issues that the averments of the bill do not support the decree. *Masterson v. Howard*, 18 Wall. 103, 21 L. ed. 765; *Ohio C. R. Co. v. Central Trust Co.* 133 U. S. 83, 33 L. ed. 561, 10 Sup. Ct. Rep. 235; *Thomson v. Wooster*, 114 U. S. 104-120, 29 L. ed. 105-110, 5 Sup. Ct. Rep. 788.

#### *Grounds for Setting Aside the Order or Decree Pro Confesso.*

A decree against one joint defendant settles no right (*Lockhart v. Horn*, 3 Woods. 548, Fed. Cas. No. 8,446); he merely loses his standing in court (*Frow v. De La Vega*, 15 Wall. 552, 21 L. ed. 60). So when a decree *pro confesso* has been taken against one of several joint defendants, and decided on the merits in favor of the other defendants, it sets aside the *pro confesso* decree. *Ibid.*

Again, when the order *pro confesso* has been entered on irregular service, it is good ground for setting it aside. *Blythe v. Hinckley*, 84 Fed. 228; *Treadwell v. Cleveland*, 3 McLean, 283, Fed. Cas. No. 14,155. So when the bill is fatally defective (*Eldred v. American Palace Car Co.* 103 Fed. 209; *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 376); or failure to file an answer by oversight of counsel (*Schwartz v. Kennedy*, 156 Fed. 317, 318; see also *McFarland v. State Sav. Bank*, 129 Fed. 244); or allegations insufficient (*Wong Him v. Callahan*, 119 Fed. 381; *Eldred v. American Palace Car Co.* 103 Fed. 209). So when the bill has been amended materially after service of process. *Nelson v. Eaton*, 13 C. C. A. 523, 27 U. S. App. 677, 66 Fed. 378;

Blythe v. Hinckley, 84 Fed. 244. So entry of order after service by publication if motion promptly made. American Freehold Land Mortg. Co. v. Thomas, 18 C. C. A. 327, 30 U. S. App. 690, 71 Fed. 782; Beach v. Mosgrove, 4 McCrary, 50, 16 Fed. 305. So when an answer has been stricken out on ground of contempt, it will not justify entering a decree *pro confesso*. Hovey v. Elliott, 167 U. S. 443, 42 L. ed. 229, 17 Sup. Ct. Rep. 841.

The discretion of the court is not hard to move when a meritorious defense is shown, and some excuse for not appearing within the time required by the rules. The motion, however, must be made promptly (Conly v. Buchanan, 81 Fed. 58), at the term in which the decree is entered. You cannot vacate at a subsequent term, as stated above, unless your motion was filed at the entry term, and went over without hearing, or continued by the court. Stuart v. St. Paul, 63 Fed. 644.

### *Form of Motion to Set Aside.*

Title as in bill.

And now comes the defendant and moves the court to set aside the order (or decree) *pro confesso* entered on the.....day of....., A. D. 19..., and permit him to appear and plead for the following reasons to wit: (Here set out your reasons in full why you did not appear, and if motion is supported by irregularity of service, or defects in bill, state them specifically, and if you wish to answer the bill, and try on merits, you should show meritorious defense.)

The motion must be supported by affidavit, unless based on grounds appearing of record.

The same form of motion applies to final decrees. Equity rule 19.



## CHAPTER LXVII.

### DEFENSES.

We will now assume that the defendant has been served with a subpoena, that he has entered a general appearance, or has entered a special appearance for the purpose of pleading his privilege to be sued in the district of his residence and citizenship, or for any other purpose, and the same has been overruled, and he now has to file some defense of law or fact, going to the merits of the controversy.

Equity rule 18, as we have seen, requires the defendant, by the succeeding rule day after entering his appearance, unless further time is granted for cause shown, to demur, plead, or answer, in default of which judgment by confession will be taken as before explained. And by equity rule 32 he may, at any time before the bill is taken as confessed, demur, plead, or answer to the whole bill or to part.

Now, in filing these defenses the general rule obtains (equity rule 32) that you may demur to the whole bill, or plead to the whole bill, or answer the whole bill, or you may demur to one part, plead to one part, and answer a part; but you cannot file a demurrer, plea, and answer to the whole bill at the same time, nor can you demur, plead, and answer to the same part of a bill at the same time (*Crescent City L. S. L. & S. H. Co. v. Butchers' Union L. S. L. & S. H. Co.* 12 Fed. 225; *Bryant Bros. v. Robinson*, 79 C. C. A. 259, 149 Fed. 329; *United States v. American Bell Teleph. Co.* 30 Fed. 523), because an answer to the bill waives a demurrer or plea; which would be disregarded by a court of equity. If a plea, demurrer, and answer be filed at the same time to the whole bill, or any one part of the bill, you could at once, on motion, have the demurrer

and plea stricken out. *Ibid.* *Obert v. Marquet*, 99 C. C. A. 60, 175 Fed. 48; *Miller v. Rickey*, 123 Fed. 606; *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 511; *Adams v. Howard*, 20 Blatchf. 38, 9 Fed. 347; *Hayes v. Dayton*, 8 Fed. 702. The reason is that answering admits the sufficiency of the bill, and the demurrer or plea raises the issue of insufficiency, either as to law or fact.

As stated, you can plead to part, demur to part, and answer as to the residue of the bill. This was the general rule, but great inconvenience arose from a strict enforcement of it, because in answering a part it may have gone to some part which had been demurred or pleaded to, so the Supreme Court promulgated equity rule 37, providing that no demurrer or plea should be held bad or overruled because the answer of the defendant may extend to some part of the same matter that might be covered by the demurrer or plea. *Crescent City L. S. L. & S. H. Co. v. Butcher's Union L. S. L. & S. H. Co.* 12 Fed. 225. *Ibid.* *Re Cooper Bros.* 159 Fed. 957.

It was said in *Adams v. Howard*, 20 Blatchf. 38, 9 Fed. 347, that when both a demurrer and answer was filed to a bill, or covering the same subject-matter, you may be required to elect upon which of the two you will stand; but if the demurrer is elected and decided against you, then probably the right to answer over would be lost under equity rule 34; but, whatever doubt may exist as to the correctness of this practice, it is better to hold that the answer waives the demurrer if it denies all the facts of the bill fully and categorically. *Strang v. Richmond, P. & C. R. Co.* 41 C. C. A. 474, 101 Fed. 515.

If you do not desire to send the bill to a master to strike out scandalous and impertinent matter, as before explained, before answering, then you must examine the bill to determine whether you will interpose a demurrer to the whole or any part of the bill. You will then scan the bill with a view to filing a demurrer if there should appear:

- (a) A want of jurisdiction.
- (b) A defect of parties, as misjoinder, or a want of necessary parties.
- (c) As to substance or form.
- (d) If laches should appear.

*As to Jurisdiction.*

First. With this purpose in view you shall inquire if, as brought, it is obnoxious to section 723 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 583, forbidding the bringing of a suit in equity when there is an adequate remedy at law. If this is apparent, demurrer will lie. *Farley v. Kittson*, 120 U. S. 316, 30 L. ed. 689, 7 Sup. Ct. Rep. 534; *United States L. Ins. Co. v. Cable*, 39 C. C. A. 264, 98 Fed. 764.

If the suit is one in equity, either as to subject-matter or the relief sought, you will then inquire:

Second. Is there proper diversity of citizenship, and is it shown by the bill as heretofore explained?

If the jurisdiction does not rest upon diversity of citizenship, you will then inquire:

Third. Is a Federal question stated; that is, does the right of recovery depend on a proper construction of the Constitution or laws of the United States or treaties made, etc., as before explained, and is the Federal question properly set out?

Fourth. Whatever be the basis of jurisdiction, you will next inquire if the proper amount is involved to give the court jurisdiction.

Fifth. Is the suit brought under any of the fundamental heads of jurisdiction as contained in section 1, act of 1888, and, if so, is it properly alleged, so that jurisdiction appears both general and territorial?

*Defect of Parties.*

Assuming you are satisfied on the point of jurisdiction, you will next inquire as to parties. Are the parties to the bill proper parties, or does it appear that other parties should be made? Have the parties that have been made, capacity to sue, and, if so, are they suing in their proper capacity?

We have already seen that defect of parties is a good defense, unless under equity rule 22 the bill shows good cause for not making them parties. *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed.

791, chap. 46. If the defect is apparent, it may be set up by demurrer, but the demurrer must name the proper parties, if there be a want of parties, and if objection is made by demurrer, you have already been given a proper form. *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 51-57.

*Sufficiency of Substance of Bill.*

Being satisfied with the parties, you will next inquire into the substance of the bill.

(a) Is there any equity in the bill? *Farley v. Kittson*, 120 U. S. 316, 30 L. ed. 689, 7 Sup. Ct. Rep. 534; *Rhode Island v. Massachusetts*, 14 Pet. 210-258, 10 L. ed. 423-446.

(b) Does plaintiff show an interest, and, if so, is the defendant answerable?

(c) Does it appear that the defendant has, or claims an interest?

(d) Is the plaintiff entitled to the relief prayed for?

(e) Does the bill carry its own death wound by showing a defense?

(f) Does it appear that limitations, or the statute of frauds, or any other statute prevents relief?

(g) Does stale demand appear and not properly excused? *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 520, 57 U. S. App. 730, 87 Fed. 59; *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 827; *Fuller v. Montague*, 8 C. C. A. 100, 16 U. S. App. 391, 59 Fed. 220; *Ulman v. Jaeger*, 67 Fed. 980.

(h) Is the claim against public policy, or illegal?

These are defenses to any bill, and when apparent may be set up by demurrer, or you may waive the demurrer, and set them up by plea or answer. Your attention is called to the fact that a general demurrer will not be good, if any relief whatever can be granted under the bill, however defective the allegations may be. *Edwards v. Bay State Gas Co.* 91 Fed. 946.

You will next examine the bill as to matter of form.

(a) The proper allegation of jurisdictional facts, though jurisdiction exists.

(b) Does plaintiff state positively facts within his knowledge?

(c) Are the allegations sufficiently certain. *Einstein v. Schnebly*, 89 Fed. 540; *Johnson v. Wilcox & G. Sewing Mach. Co.* 25 Fed. 373.

(d) Is the prayer for process properly stated?

(e) Is the bill signed by counsel?

(f) Is the bill one that should be verified, and, if so, is the affidavit in proper form?

These objections are, for the most part, formal, and easily amendable.

## CHAPTER LXVIII.

### DEMURRER.

Having thus suggested matters to be inquired into with a view of interposing a demurrer, I will now speak of demurrers in equity generally.

#### *Classified.*

Demurrers are general and special. A general demurrer usually goes to a want of equity in the bill, but also applies to defects in substance when clearly apparent, but in this case it is always better to specially demur. Special demurrers go to defective allegations, or to part of a bill defectively stated, and must point out particularly the defect in the allegation of the part demurred to.

#### *Effect of Demurrer.*

The demurrer raises only questions of legal sufficiency; it cannot recite facts, and must show distinctly the parts of the bill demurred to. *Miller v. Rickey*, 123 Fed. 604; *Star Ball Retainer Co. v. Klahn*, 145 Fed. 834; *Richardson v. Loree*, 36 C. C. A. 301, 94 Fed. 379; *Stewart v. Masterson*, 131 U. S. 151, 33 L. ed. 114, 9 Sup. Ct. Rep. 682; *Richardson v. Loree*, 36 C. C. A. 301, 49 Fed. 379; *O'Shaugnessy v. Humes*, 129 Fed. 960. A "speaking demurrer" is not allowed. *Star Ball Co. v. Klahn*, 145 Fed. 834. And it admits as true all allegations of the bill well pleaded, and in substance says that, admitting the facts to be true, the plaintiff cannot recover. *Kansas v. Colorado*, 185 U. S. 126, 46 L. ed. 838, 22 Sup. Ct. Rep. 552; *Edison v. Thomas A. Edison, Jr., Chemical Co.* 128

Fed. 957; Puget Sound Nat. Bank v. King County, 57 Fed. 433; Preston v. Smith, 26 Fed. 884; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 10, 38 L. ed. 59, 14 Sup. Ct. Rep. 240; Chicot County v. Sherwood, 148 U. S. 536, 37 L. ed. 549, 13 Sup. Ct. Rep. 695; Dennison Co. v. Thomas Mfg. Co. 94 Fed. 654. It does not admit conclusions of law (Young v. Merchantile Trust Co. 140 Fed. 61; United States v. Ames, 99 U. S. 35-45, 25 L. ed. 295-300; General Electric Co. v. Westinghouse Electric & Mfg. Co. 144 Fed. 467; Pen-  
nie v. Reis, 132 U. S. 469, 33 L. ed. 428, 10 Sup. Ct. Rep. 149; Cornell v. Green, 43 Fed. 105; Haynes v. Brewster, 46 Fed. 473); as alleging simply the transaction was fraudulent (Lumley v. Wabash R. Co. 71 Fed. 28; Fogg v. Blair, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476; Patent Title Co. v. Stratton, 95 Fed. 746; Edison v. Thomas A. Edison, Jr., Chemical Co. 128 Fed. 957; Kittel v. Augusta T. & G. R. Co. 65 Fed. 860). Nor matters of inference or argument. Pullman Palace Car Co. v. Missouri P. R. Co. 3 McCrary, 645, 11 Fed. 634. Nor does it admit constructions given in a bill to a statute. Pennie v. Reis, 132 U. S. 464-470, 33 L. ed. 426-429, 10 Sup. Ct. Rep. 149. Nor of a written instrument. Gould v. Evansville & C. R. Co. 91 U. S. 536, 23 L. ed. 419; Interstate Land Co. v. Maxwell Land Grant Co. 139 U. S. 569, 35 L. ed. 278, 11 Sup. Ct. Rep. 656; Dillon v. Barnard, 21 Wall. 437, 22 L. ed. 676; O'Shaugnessy v. Humes, 129 Fed. 954. Nor any ascription of purpose not justified by acts. Dillon v. Barnard, 21 Wall. 437, 22 L. ed. 676; Taylor v. Holmes, 14 Fed. 509. Nor that the design in a patent is new. New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co. 137 U. S. 445, 34 L. ed. 741, 11 Sup. Ct. Rep. 193.

In Boyd v. Nebraska, 143 U. S. 180, 36 L. ed. 116, 12 Sup. Ct. Rep. 375, it was held that a demurrer admitted the allegation that a party was a naturalized citizen as alleged. In Post v. Beacon Vacuum Pump & Electrical Co. 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 1, it was held that, under a general demurrer, equitable estoppel may be assigned, *ore tenus*, and whenever the bill alleges matter detrimental to the case it may be taken advantage of by general demurrer, as laches in bill. Wollensak v. Reiher, 115 U. S. 101, 29 L. ed. 351, 5 Sup.

Ct. Rep. 1137; *Hardt v. Heidweyer*, 152 U. S. 558, 38 L. ed. 552, 14 Sup. Ct. Rep. 671.

*Form of General Demurrer.*

Title as in bill.

The demurrer of C. D. (or the joint and several demurrers of C. D. and E. F.) to the bill of complaint.

And now comes the defendant C. D., and not confessing any of the matters in the bill to be true, demurs to the bill herein filed and says the same does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

Wherefore defendant prays the judgment of this court whether he shall further answer, and that he be dismissed with his costs.

R. F.,  
Solicitor, etc.

Certificate of counsel must be attached to the demurrer as follows:

I, R. F., solicitor for defendant in the above, do hereby certify that the foregoing demurrer, in my opinion, is well founded in law.

R. F.,  
Solicitor.

Equity rule 31.

Then must be attached the affidavit of the defendant as follows:

I, C. D., defendant in the above cause, being duly sworn, do say that the foregoing demurrer is not interposed for delay.

C. D.

Sworn to and subscribed before me this the.....day of....., A. D. 19...

[SEAL.]

X. Y.,  
Notary.

It seems all the defendants must swear, unless the court permits one to make the affidavit. *Computing Scale Co. v. Moore*, 139 Fed. 197. The protestation clause usually inserted in a demurrer or plea has no effect in limiting admissions of facts properly pleaded. *Taylor v. Holmes*, 14 Fed. 501.

If the demurrer be by a corporation, then the affidavit should be made by an officer of the corporation authorized so to do,



and he should state in the oath his representative or official position. The object of the certificate and oath was intended to prevent evasion of the discovery usually sought in a bill, which disclosures were sought through the answers required to the interrogatories in a bill. *Farley v. Kittson*, 120 U. S. 317, 30 L. ed. 689, 7 Sup. Ct. Rep. 534.

A demurrer filed without the certificate and oath is a nullity, and it may be disregarded, and an order taking the bill as confessed entered (*Computing Scale Co. v. Moore*, 139 Fed. 197; *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 Fed. 598; *Dupree v. Leggett*, 124 Fed. 700; *Bryant Bros. v. Robinson*, 79 C. C. A. 259, 149 Fed. 328; *Preston v. Finley*, 72 Fed. 850; *Brazoria County v. Youngstown Bridge Co.* 25 C. C. A. 306, 52 U. S. App. 6, 80 Fed. 13; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 576, 37 L. ed. 855, 13 Sup. Ct. Rep. 936; equity rule 31), although the demurrer may be good in substance (*Ibid.*). And the rule applies whether the demurrer be general or special. The only exception to the rule stated is where a preliminary injunction is prayed for. *Preston v. Finley*, 72 Fed. 854.

The form of demurrer given may be used for special demurrers, simply stating, "and specially demurs," etc., and inserting before the prayer the special grounds of demurrer. If you desire to demur to only a part of the bill, then say, "do demur to so much of said bill as" (here set forth part demurred to) which should be pointed out with certainty (Equity rule 32; *Miller v. Rickey*, 123 Fed. 604; *Ormsby v. Union P. R. Co.* 2 McCrary, 48, 4 Fed. 170; *Chicago, St. L. & N. O. R. Co. v. Macomb*, 2 Fed. 18), and pray whether the defendant should be compelled to answer the part demurred to. When you demur to only part of the bill, you must plead or answer the residue; the whole bill must be met, or it will be taken as confessed as to the part not answered or pleaded to.

It is stated, when a demurrer goes to a part of the bill it must be pointed out with certainty. The reason is that in case the demurrer is sustained, the extent of the judgment as to the other parts of the bill may be entered with certainty.

### *Setting Down for Argument.*

We have seen by equity rule 18 that if a demurrer is necessary. Eq.—26.

sary, it must be filed by the rule day next succeeding the entry of appearance, unless further time is granted by the court for cause shown. When the demurrer is properly filed, the duty devolves on the plaintiff, by equity rule 33, to set it down for argument, and by equity rule 38 it is provided that the failure of plaintiff to set down the demurrer for argument on the rule day when the same is filed, or the next succeeding rule day, the plaintiff admits the sufficiency of the demurrer, and the defendant can have the bill dismissed as a matter of course, unless the court allows further time. So it is seen that the plaintiff must act promptly, or have his bill dismissed. *Robinson v. Chicago R. Co.* 98 C. C. A. 26, 174 Fed. 40.

What constitutes setting down a demurrer for argument is not defined in the rules. The English practice was to set it down on motion to be served two days before hearing. The practice in the Federal courts is to make the application in the clerk's office and have it entered in the order book, and being grantable of course, comes under equity rule 4. As to the question of notice, making an entry in the order book of a motion grantable of course is sufficient notice to the defendant and his solicitor. *Gillette v. Doheny*, 65 Fed. 716, 717.

The conclusion, then, from these rules is, that when a demurrer is filed, the plaintiff must act promptly in setting it down for hearing to save the bill. The hearing may be set down for the subsequent rule day, or as soon thereafter as practicable, which means whenever the judge can be reached, whether in term time or vacation. It is proper here to state that in all pleadings filed by the defendant in the preparation of his case for final hearing, the burden is on the plaintiff to promptly set it down for hearing, or to reply, and on failure to do so, his bill may be dismissed.

To set down the demurrer for hearing, file with the clerk the following request:

Title as in bill.

To the Clerk, etc.:

You will please set down for hearing the demurrer filed in this cause to the bill on the.....day of ....., A. D. 19.... Hearing to be had at.....on the.....day of....., A. D. 19..., it being the rule day in (month) or to be heard as soon thereafter as practicable.

R. F.,  
Solicitor.

It is the duty of the clerk to enter of course the order for hearing in the order book, and as soon as this is done, until the hearing of the demurrer, the bill is safe. If the judge be not present on the rule day indicated, and at the place appointed in the notice, you will have to wait until you can reach him, either in term time or vacation. That is, if it is desired to speed the cause, the plaintiff may have it heard by the judge at chambers or in term, if sitting within the district, but if not heard at time and place appointed, as entered in the order book, you must give counsel notice of the time and place when and where the judge will hear it. The plaintiff should use reasonable diligence in getting a hearing on the demurrer. In cities, or a limited territory where a Federal judge may always be found, there is not much difficulty in getting a cause prepared for final hearing, but where a district covers a vast amount of territory, it is generally difficult and expensive to pursue the judge and get a hearing on these preliminary steps to a final hearing of the case. The consequence is delay and tediousness in maturing a case for hearing.

If you are fortunate enough to catch the judge at some point in his district, and to catch him in the humor to hear your demurrer or motion, or whatever it may be, then upon the hearing the following rules must be considered:

Equity rule 36 provides that a demurrer is not defective because it did not cover so much of the bill as it might by law have extended to. Nor will a demurrer be overruled because the answer may extend to some part of the same matter that may be covered by the demurrer. *Huntington v. Laidley*, 79 Fed. 865; *Merchandise Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 379; *Re Cooper Bros.* 159 Fed. 957; *Odbert v. Marquette*, 99 C. C. A. 60, 175 Fed. 48; Equity rule 37.

Again, in determining the demurrer, the bill and exhibits are taken together (*Continental Securities Co. v. Interborough Rapid Transit Co.* 165 Fed. 945; *Ulman v. Jaeger*, 67 Fed. 980); and if it appears that plaintiff is entitled to some kind of relief, even though the specific relief will not be granted, the general demurrer will be overruled. *Edwards v. Bay State Gas Co.* 91 Fed. 946; *Berwind v. Canadian Co.* 98 Fed. 158; *Benedict v. Moore*, 76 Fed. 472; *Mercantile Trust & D. Co. v. Rhode Island Hospital Trust Co.* 36 Fed. 863; *United States*

v. Southern P. R. Co. 40 Fed. 611; *Stewart v. Masterson*, 131 U. S. 158, 33 L. ed. 116, 9 Sup. Ct. Rep. 682. Or, to put the proposition in another form, the general demurrer will be overruled unless it appears that under no possible state of the evidence a decree could be entered. *Failey v. Talbee*, 55 Fed. 892; *Maeder v. Buffalo Bill's Wild West Co.* 132 Fed. 280.

When the demurrer goes to the whole bill, and a special demurrer to part of the bill, and the special demurrer is alone sustained, the proper decree is to dismiss so much of the bill covered by the special demurrer, unless an amendment is allowed, and to overrule as to the residue, and direct an answer thereto. *Giant Powder Co. v. California Powder Works*, 98 U. S. 140, 25 L. ed. 83. The court may refuse to decide the case on demurrer, and order an answer (*Rankin v. Miller*, 130 Fed. 229); or may leave its decision to the final hearing (*Snyder v. DeForest Wireless Teleg. Co.* 154 Fed. 142).

### *Allowing Demurrer.*

If the general demurrer be sustained, the defendant is entitled to his costs to that period (equity rule 35); and if it appears that there be probable ground for perfecting the bill by amendment, the court will permit the amendment under such terms as he may deem reasonable and just. U. S. Rev. Stat. sec. 954; U. S. Comp. Stat. 1901, p. 696; *Boston & A. R. Co. v. Parr*, 98 Fed. 483; *Edward P. Allis Co. v. Withlacoochee Lumber Co.* 44 C. C. A. 673, 105 Fed. 680. It is in the discretion of the court to permit the amendment, and is not a matter of right, for it is held that an order refusing an amendment will not be revised by the Supreme Court, unless you set forth in the record the amendment sought and there appears a clear abuse of discretion. *Ibid.*; *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 568, 25 L. ed. 815; *Dowell v. Applegate*, 7 Sawy. 232, 8 Fed. 698. The judgment on a demurrer sustained is to dismiss the bill (*Fowler v. Osgood*, 4 L.R.A. (N.S.) 824, 72 C. C. A. 276, 141 Fed. 20-24), unless amendment allowed, but it is only an adjudication as to the exact point raised. *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.* 121 Fed. 313-318; *Wiggins Ferry Co. v. Ohio & M. R.*

Co 142 U. S. 396, 35 L. ed. 1055, 12 Sup. Ct. Rep. 188; Russell v. Place, 94 U. S. 606, 24 L. ed. 214. So the decree should limit the demurrer, and not dismiss generally if the demurrer is sustained on grounds not going to the merits. Fowler v. Osgood, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 24.

### *Overruling Demurrer.*

If the demurrer be overruled, the plaintiff is entitled to his costs to that period, unless the court is satisfied he had reasonable ground to interpose the same, and it was not done for delay. Equity rule 34. The defendant will at once be assigned to answer the bill, which is a matter of right (Files v. Brown, 59 C. C. A. 403, 124 Fed. 142), but upon a failure to file an answer within the time prescribed by the court, the plaintiff is authorized to take the bill as confessed. Successive demurrers are not allowed, and overruling the demurrer requires a plea or answer as the next step. Fuller v. Knapp, 24 Fed. 100; Victor Talking Mach. Co. v. Hoschke, 169 Fed. 894. If a demurrer has been filed, the record must show what has become of it; if not, it is presumed to have been abandoned. Basey v. Gallagher, 20 Wall. 679, 22 L. ed. 452, 1 Mor. Min. Rep. 683; Southern R. Co. v. Rhodes, 30 C. C. A. 157, 58 U. S. App. 349, 86 Fed. 424.

If the demurrer is not set down for hearing, the defendant can, as before stated, enter an order in the order book dismissing the bill, unless further time has been given by the court (Ryan v. Seaboard & R. R. Co. 89 Fed. 402), and this is done by simply addressing the clerk of the court the following request:

Title' as in bill.

To the Clerk, etc.:

You will please enter an order dismissing the bill in the above cause, as provided by equity rule 38, because of the failure of plaintiff to set down for hearing the demurrer filed by the defendant to the bill on the..... day of ....., A. D. 19...

R. F.,  
Solicitor.

The dismissal being a matter of course, the clerk must enter

the order of dismissal in the order book, which stops any further proceeding until the bill is reinstated.

*Demurrer When Fraud is Charged in the Bill.*

Where fraud is properly alleged in a bill, and a demurrer is filed, it was held in *Johnson v. Forsyth Mercantile Co.* 127 Fed. 846, that the demurrer must be accompanied with an answer denying the fraud, as required in filing a plea (see "Plea" chap. 69). Rule 32.

## CHAPTER LXIX.

### PLEA.

We have seen under what conditions a demurrer should be filed, and it applied only when the legal objection was apparent on the face of the bill; but it may be that the same objections touching the jurisdiction, parties, and substance of the bill may not be apparent on the face of the bill, but still be an existing fact; that is, the allegations as to some of these matters may not be true in fact, which if shown would abate the suit, or bar it; or it may be that facts connected with the subject-matter, jurisdiction, or parties are not alleged, which if alleged would abate or destroy the equity of the bill and bar it. This may be done by a plea.

By equity rule 18 it is provided that the defendant must file his plea in the clerk's office, unless the time is extended for cause, on the rule day next succeeding that of entering appearance in the cause, or the bill can be taken as confessed.

By equity rule 32 it is provided that the defendant may at any time before the bill is taken as confessed, or afterwards with leave of the court, file a plea to the whole bill, or to part of it; but whenever the bill charges fraud or combination, the plea must be accompanied with an answer fortifying the plea, and distinctly denying the fraud and combination and the facts on which the charge is founded.

### *Office of Plea.*

Before presenting the form and elements of a good plea, I will speak of its office in the equity system. A plea in equity is in the nature of a speaking demurrer. The demurrer says you have alleged a fact which destroys your equity, or failed to allege a fact which creates the equity; the plea says, you have failed to allege a fact which should have been alleged, and

which if you had alleged would destroy your equity. The demurrer goes to the sufficiency of the bill to obtain the relief, as a matter of law; the plea inserts a fact which, if true, or denies a fact as true, which if proven, would destroy the equity, or the right to prosecute the suit at the time or in the manner it is brought. *United States v. Peralta*, 99 Fed. 624. In a word, a plea destroys an allegation, or interposes a fact or foreign matter which stays or bars the suit. *Ibid.*; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Korn v. Wiebusch*, 33 Fed. 50; *Hubbell v. DeLand*, 11 Biss. 382, 14 Fed. 475. Then the office of a plea is to present some distinct fact or deny some distinct fact alleged, which, if true, abates or bars the suit, and when going to the whole bill it avoids the delay and expense of a trial on other issues that may have been tendered by the bill. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214; *Briggs v. Stroud*, 58 Fed. 721.

To illustrate: Take a case to which the statute of frauds is an answer. If an agreement concerning lands is alleged to be in parol, the advantage of the statute may be taken by demurrer; but suppose the bill is silent, or it alleges it to have been in writing, when in fact it was not, you make the single issue by plea, which, if true, disposes of the case if based on the alleged agreement.

The plea should reduce the defense to a single issue (*United States v. American Bell Teleph. Co.* 30 Fed. 524; *United States v. California & O. Land Co.* 148 U. S. 31-49, 37 L. ed. 354-362, 13 Sup. Ct. Rep. 458), and it should appear that, if true, the bill need not be further answered.

The plea, like the demurrer, should pray the court for judgment, whether the bill or the part to which the plea applies should be further answered, and both pray for dismissal. *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534. A plea, like a demurrer, admits what has been alleged, but either insists that a fact should have been alleged which destroys the equity, or, admitting all other allegations, denies some single allegation in the bill, which, if the plea be proven, destroys the equity.



*Classification of Pleas.*

We see, then, from the statement of the office of a plea, that they may be classified into pleas in abatement and pleas in bar.

*Pleas in Abatement.*

I have already sufficiently discussed pleas setting up venue, or the personal privilege of being sued in one's own district of residence, and forms for this character of plea were given, p. 130 et seq.

We saw that this plea of venue was purely a plea in abatement, which could be waived by general appearance, or by an appearance to procure an extension of time to answer. Page v. Chillicothe, 6 Fed. 602; Briggs v. Stroud, 58 Fed. 717; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 131, 35 L. ed. 661, 11 Sup. Ct. Rep. 982; Central Trust Co. v. McGeorge, 151 U. S. 133, 38 L. ed. 100, 14 Sup. Ct. Rep. 286; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 220, 40 L. ed. 402, 16 Sup. Ct. Rep. 272. And we have seen that objection to venue may be made by motion, if the plaintiff did not object. Bicycle Stepladder Co. v. Gordon, 57 Fed. 529; Reinstadler v. Reeves, 33 Fed. 308.

We have also seen that defect of parties may be set up by plea in abatement, or some disability, such as infancy, coverture, lunacy, or the nonexistence of the character and capacity in which the parties are suing, or party is sued, such as partners, trustees, executors, administrators, or heirs. You may set up by plea in abatement bankruptcy, want of interest, or any other matter which would abate the suit, but which does not appear in the face of the bill. United States v. Gillespie, 6 Fed. 803; Sheffield & B. Coal, Iron & R. Co. v. Newman, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 791; Marshall v. Otto, 59 Fed. 252. Forms for these pleas have already been given.

*Another Suit Pending.*

You may set up in abatement another suit pending, however it is proper to call your attention to the conditions under which

the plea can be filed and sustained in the Federal court when the suit is pending in a State court. On the law side, the pendency of a suit in a State court does not abate a suit in the Federal court. *Burk v. McCaffrey*, 136 Fed. 696; *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 945; *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 282; *Mankato v. Barber Asphalt Paving Co.* 73 C. C. A. 439, 142 Fed. 329; *Bank of Commerce v. Stone*, 88 Fed. 398; *Ogden City v. Weaver*, 47 C. C. A. 485, 108 Fed. 568; *Defiance Water Co. v. Defiance*, 100 Fed. 178. On the equity side a case will not be dismissed though the plea be sustained, but if the suit is pending in a State equity court, the Federal court will suspend proceedings and await the result of the suit in the State court. *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *New York Cotton Exch. v. Hunt*, 144 Fed. 511; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 2; *Boatmen's Bank v. Fritzlen*, 135 Fed. 667; *Foley v. Hartley*, 72 Fed. 570; *Gamble v. San Diego*, 79 Fed. 487; *Hennessy v. Tacoma Smelting & Ref. Co.* 129 Fed. 40; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

The rules as above given apply only to suits that are of a personal character. When the suit affects the custody of property in the State court, the court first acquiring jurisdiction retains it, without interference from the other. *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Williams v. Neely*, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 2; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 965; *National Foundry & Pipe Works v. Oconto City Water Supply Co.* 51 C. C. A. 465, 113 Fed. 793; *Briggs v. Stroud*, 58 Fed. 720; *Ogden City v. Weaver*, 108 Fed. 568.

If you should set up in abatement a suit pending, the plea should show, first, same parties; second, same cause of action; third, whether the case is pending in law or equity; fourth, the same relief sought; fifth, the state of the pleadings in the other court. If not strictly within these rules, the plea should be overruled. *Griswold v. Bacheller*, 77 Fed. 857; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

Matters in abatement merely suspending the right to sue, or defeating temporarily the procedure in that particular court,

should be set up by plea or demurrer (*Marshall v. Otto*, 59 Fed. 252), as it saves both time and expense to have them determined in limine.

Equity rule 39 excepts mere matters of abatement, character of parties, or matters of form, from the defenses that can be set up by answer (*United States v. Gillespie*, 6 Fed. 803), and some of the Federal judges, recognizing the necessity of disposing of pleas in abatement as early as possible, have adopted local rules governing the practice of their respective districts, requiring all matters of pure abatement to be set up by preliminary answer in the nature of a plea, to which issue must be joined and the issue determined at once and before defendant is required to answer. *Marshall v. Otto*, 59 Fed. 252.

## CHAPTER LXX.

### PLEAS IN BAR.

You can set up by plea any single fact that would destroy the equity of a bill through which relief is sought. Such pleas are called pleas in bar. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29. Thus, first, the statutes of frauds, or limitations, or other defense may be set up in bar of the equity. *McCloskey v. Barr*, 38 Fed. 166; *United States v. California & O. Land Co.* 148 U. S. 38, 39, 37 L. ed. 358, 13 Sup. Ct. Rep. 458. Second, laches in bringing suit. *Farrand v. Land & River Improv. Co.* 30 C. C. A. 128, 58 U. S. App. 559, 86 Fed. 393. Third, records, such as judgments and decrees, showing prior adjudication. *Mound City Co. v. Castleman*, 171 Fed. 521; *Westinghouse Electric & Mfg. Co. v. Jefferson Electric Light, Heat & P. Co.* 128 Fed. 751; *John D. Park & Sons Co. v. Bruen*, 133 Fed. 807; *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 386, 5 A. & E. Ann. Cas. 314; *Fowler v. Stebbins*, 69 C. C. A. 209, 136 Fed. 365; *Montgomery v. McDermott*, 99 Fed. 502; *Desert King Min. Co. v. Wedekind*, 110 Fed. 873; *Nugent v. Philadelphia Traction Co.* 87 Fed. 251; *Moredock v. Moredock*, 179 Fed. 163. Fourth, release agreements and awards. *Armengaud v. Coudert*, 23 Blatchf. 424, 27 Fed. 247. Fifth, title acquired by limitation. Sixth, title by will. Seventh, *bona fide* purchaser. *United States v. California & O. Land Co.* 148 U. S. 40, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *United States v. Winona & St. P. R. Co.* 165 U. S. 479, 41 L. ed. 796, 17 Sup. Ct. Rep. 368. Eighth, collusive suit. *Dinsmore v. Central R. Co.* 19 Fed. 153; *McVeagh v. Denver City Waterworks Co.* 29 C. C. A. 33, 55 U. S. App. 267, 85 Fed. 74.

Having thus indicated what defenses may be set up by pleas

in abatement and bar, the question arises whether pleas in bar are the most effective way of pressing these defenses. Pleas in abatement requiring something to be stricken out or added in order to fairly get your issues before the court are necessary (*Livingston v. Story*, 11 Pet. 393, 9 L. ed. 763; *Marshall v. Otto*, 59 Fed. 252; equity rule 39); but often it is a waste of time to present your defenses by plea in bar.

If you consider your plea an effective bar, such as limitation or the statute of frauds, former adjudication, etc., reaching the very vitals of the cause of action upon which the bill is based, then by all means file the plea, for it reduces the issue to a single point and saves time and expense and proof at large. *Eveleth v. Southern California R. Co.* 123 Fed. 838; *Farley v. Kittson*, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534; *Miller v. Rickey*, 123 Fed. 608. But if the result of your plea is doubtful, or it only goes to a part of the bill, and you have to answer to the other part, then let the plea alone and present your issues by answer and take the benefit of the entire defense. Equity rule 39; *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446; *Chisholm v. Johnson*, 84 Fed. 384.

Again, when you file a plea the burden of proof is on you, but when you file an answer, the burden remains with the plaintiff to establish his case, before your sworn answer is overcome and you are required to be the actor.

Equity rule 39 provides that the defendant (except in matters of abatement, or parties, or form) may set up in his answer all matters in bar that he could insist on by plea, and in such answer he is not required to set up any other than he would be required to set forth in a plea, and an answer in support of said plea, which means that you may confine your answer to a single plea in bar if you are justified in risking your case on a single issue. The rule may be illustrated where the defense rests upon the fact that one is a *bona fide* purchaser, which would be a full answer to the equities set up in the bill. You may set it up and decline to make further discovery as to other matters alleged not affecting the good faith of the purchaser. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29, 30; *Hatch v. Bancroft-Thompson Co.* 67 Fed. 805; *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446.

*Form of Plea.*

The plea, like the demurrer, must have the certificate of counsel and the affidavit of the defendant attached, except the affidavit differs as we shall see.

The general form of plea is as follows:

Title as in bill.

The plea of C. D. (or the joint and several plea of C. D. and E. F., defendants) to the bill of complaint.

And now comes the defendant C. D. (or defendants, etc.), and not confessing any of the matters contained in the bill of complaint to be true, for plea to said bill (or so much of said bill as seeks, etc. State part pleaded to substantially) do plead thereto and say (here insert matter of plea), all of which defendant alleges to be true, and pleads the same in bar (or abatement) to the bill (or so much as is plead to) and prays the judgment of the court whether he shall further answer said bill (or the part plead to), and upon hearing said plea that this defendant be dismissed hence with his costs and charges in this behalf incurred.

R. F.,  
Solicitor.

*Certificate of Counsel.*

I, R. F., solicitor, etc., in the above cause, do hereby certify that the above plea is well founded in law.

R. F.,  
Solicitor, etc.

*Affidavit of Defendant.*

I, C. D., defendant (or one of the defendants) in the above cause, being duly sworn do say that the foregoing plea to the bill of complaint is true in point of fact and is not interposed for the purpose of delay.

C. D.,  
Defendant.

Sworn to and subscribed before me this the..... day of....., A. D. 19...

[SEAL]

*Officer's signature.*

When defendants joint all must verify unless the court permits otherwise.

As said, the certificate and affidavit are essential, the failure to add is equally as fatal as it is in the case of the demurrer, as before explained. It may be stricken from the files on motion or entirely disregarded (American Steel & Wire Co.

v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3, 90 Fed. 599; Preston v. Finley, 72 Fed. 850; Computing Scale Co. v. Moore, 139 Fed. 197), and decree *pro confesso* entered (Computing Scale Co. v. Moore, 139 Fed. 197). Verification may be waived by setting down for hearing. Computing Scale Co. v. Moore, 139 Fed. 200. Seal not necessary when filed by corporation. Fayerweather v. Hamilton College, 103 Fed. 546.

### *Characteristics of Plea.*

So much for the form; let us now inquire into the characteristics of the plea.

### *The Plea Must Be Single.*

The plea must be single, that is, contain but one defense. Knox Rock-Blasting Co. v. Rairdon Stone Co. 87 Fed. 969; Miller v. Rickey, 123 Fed. 604, 607; United States v. California & O. Land Co. 148 U. S. 39, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; Jahn v. Champagne Lumber Co. 152 Fed. 669; Farley v. Kittson, 120 U. S. 303-316, 30 L. ed. 684-689, 7 Sup. Ct. Rep. 534; Hostetter Co. v. E. G. Lyons Co. 99 Fed. 735; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 83 Fed. 27; Sims v. United Wireless Teleg. Co. 179 Fed. 540. You cannot file a double plea to the whole, or any part of the bill; and by double plea is meant a plea containing two defenses. Briggs v. Stroud, 58 Fed. 718; Miller v. Rickey, 123 Fed. 607; McCloskey v. Barr, 38 Fed. 168; Gilbert v. Murphy, 100 Fed. 161; Sims v. United Wireless Teleg. Co. 179 Fed. 540; see Fayerweather v. Hamilton College, 103 Fed. 547, 548; Farley v. Kittson, 120 U. S. 303, 30 L. ed. 684, 7 Sup. Ct. Rep. 534; Giant Powder Co. v. Safety Nitro Powder Co. 10 Sawy. 23, 19 Fed. 510. For example, setting up a pending suit and want of proper parties (Sharon v. Hill, 10 Sawy. 394, 22 Fed. 28), or the statute of limitations and no liability (McCloskey v. Barr, 38 Fed. 168), or matters affecting validity of service, and want of proper citizenship (Briggs v. Stroud, 58 Fed. 717); nor matters of law and fact (Hostetter Co. v. E. G. Lyons Co. 99 Fed. 734); and where two intendments, the plea is taken most strongly

against the pleader. You may file separate pleas to separate parts of the bill, or a single plea to the whole bill, and, if it is necessary to file more than one plea to the whole bill, you must ask permission of the court. *Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 28; *Noyes v. Willard*, 1 Woods, 187, Fed. Cas. No. 10,374; *McCloskey v. Barr*, 38 Fed. 165; *Miller v. Rickey*, 123 Fed. 607, and cases cited. But several pleas will not be allowed, unless they present well-defined issues which can be separately determined from the allegations in the bill. *Gilbert v. Murphy*, 100 Fed. 161; *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. ed. 423; *McCloskey v. Barr*, 38 Fed. 165-168; *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 200, 109 Fed. 506; *United States v. American Bell Teleph. Co.* 30 Fed. 523.

### *Averments in Plea.*

The averments must be clear, positive, and distinct, and the plea must present in itself a complete equitable defense. *McCloskey v. Barr*, 38 Fed. 165. To illustrate: You cannot allege a person is sole owner, etc., without stating the facts upon which the ownership depends, so that the court can see it.

The plea must not be argumentative, but positive. *Chisholm v. Johnson*, 84 Fed. 385; *McCloskey v. Barr*, 38 Fed. 166; *McDonald v. Salem Capital Flour-Mills Co.* 31 Fed. 577; *Computing Scale Co. v. Moore*, 139 Fed. 197. To illustrate: If the question was one of jurisdiction by reason of not living in the district of suit, and the bill alleged that the defendant was a citizen of the northern district of a State, a plea setting up that the defendant was a citizen of the eastern district of the State would be bad. The proper plea would be that he is *not* a citizen of the northern district, but is a citizen of the eastern district. *McDonald v. Salem Capital Flour-Mills Co.* 31 Fed. 579.

While it is said that a plea must be single, stating a single fact upon which the abatement or bar rests, yet it is not to be understood that you may not allege a variety of facts if they all tend to one clear ground of defense which may dispose of the bill. *Vacuum Oil Co. v. Eagle Oil Co.* 122 Fed. 105; *Cooper v. Preston*, 105 Fed. 403; *Rhino v. Emery*, 79 Fed. 483;



Hazard v. Durant, 25 Fed. 26; Missouri P. R. Co. v. Texas & P. R. Co. 50 Fed. 151. To illustrate: If you wish to plead a release, you may set up all the facts inducing the release or by which it may be shown. McCloskey v. Barr, 38 Fed. 169.

So in averment of heirship in a bill, you may set up all the facts in a plea to meet the averment. Rhino v. Emery, 79 Fed. 483-485. So if you set up limitations by a plea, and the bill has sought to anticipate it by setting up disabilities, you may negative the disabilities in a plea. McCloskey v. Barr, 38 Fed. 166.

Again, if you set up the defense of a bona fide purchaser by plea, you must set up all the elements that constitutes one a bona fide purchaser. Ibid. So if you plead the statute of frauds, you must set out the facts so that the court may see the application. Ibid. So in pleading *non compos*. Dudgeon v. Watson, 23 Blatchf. 161, 23 Fed. 161.

A plea is never good that simply denies the allegations of a bill, for that is the province of the answer; such a plea should be stricken out on motion (Armengaud v. Coudert, 23 Blatchf. 424, 27 Fed. 247; Korn v. Wiebusch, 33 Fed. 50); Sharp v. Reissner, 20 Blatchf. 10, 9 Fed. 446); unless the denial of a single allegation of the bill would, if effective, destroy the equity.

### *Not Conclusions of Law.*

The plea must allege matters of fact, not conclusions of law, and if not traversible for that reason, the plea may be disregarded. Hostetter Co. v. E. G. Lyons Co. 99 Fed. 735, 736.

### *Pure Plea.*

In drawing your plea it is well to remember that the bill is taken as true in a *pure* plea, and if there is anything in the bill negating the fact that you intend setting up by the plea, you must negative all such allegations in the plea. Dwight v. Central Vermont R. Co. 20 Blatchf. 200, 9 Fed. 788; Goldsmith v. Gilliland, 10 Sawy. 606, 24 Fed. 154, 155; Hilton v. Guyott, 42 Fed. 250, 251; Rhino v. Emery, 79 Fed. 483. By a *pure* plea is meant one that depends on matter which you  
S. Eq.—27.

wish to insert in the bill to destroy the equity. *Armengaud v. Coudert*, 23 Blatchf. 424, 27 Fed. 247; *Goldsmith v. Gilliland*, 10 Sawy. 606, 24 Fed. 156. But where the plea denies a fact set up in the bill, the nonexistence of which if proved would destroy the equity, it is called a *negative* plea.

*When Plea Supported by Answer.*

We have seen that in some instances the plea must be supported by answer. By equity rule 32, in every case where charges of fraud have been alleged in the bill you must support the plea by an answer denying specifically the charges of fraud. The plea admitting the allegations not specifically denied, the court will not hear you if the fraud is not answered. You must be careful that the answer in support of the plea goes no further than the denial of the particular matters alleged charging the fraud, for any other defenses set up in such sustaining answer will waive your plea. *John v. Champagne Lumber Co.* 152 Fed. 669; *United Cigarette Mach. Co. v. Wright*, 132 Fed. 196; *Huntington v. Laidley*, 79 Fed. 866. See *Johnston v. Forsyth Mercantile Co.* 127 Fed. 846.

In addition to the requirements of equity rule 32, it has been held, as stated, that if there is anything in the bill negating the fact that you are setting up to destroy the equity, you should support your plea with a further answer negating all the allegations of the bill that would affect the substance of your plea; otherwise *pure* and proper pleas in equity need no answer in support. *Dwight v. Central Vermont R. Co.* 20 Blatchf. 200, 9 Fed. 788. But in *Hilton v. Guyott*, 42 Fed. 250—251, it is said no answer is necessary. *McDonald v. Salem Capital Flour-Mills Co.* 31 Fed. 577. But in negative pleas, that is, pleas denying a single allegation in a bill on which the whole case depended, it was held in *Dwight v. Central Vermont R. Co.* 20 Blatchf. 200, 9 Fed. 788, that a negative plea must be supported by an answer to so much of the bill as is denied; but in *Rhino v. Emery*, 79 Fed. 483—486, it is said that when plaintiff's case stands solely on the bare averment of a particular fact, it is not necessary for defendant to file an answer in support of the plea denying or negating the fact, unless the bill recites evidence tending to prove the disputed allegations.

In such case an answer supporting the plea and denying the supporting facts alleged must be filed with the plea. *McDonald v. Salem Capital Flour-Mills Co.* 31 Fed. 577.

When an answer is necessary to support your plea, you may use the following form:

Title as in bill.

And now comes the defendant C. D., and in support of his plea herein filed, which plea sets up (state substance of plea) would further answer and say, that the allegations of said bill charging fraud and combination (state substance of charge) are untrue. Defendant denies that he did, etc. (cover all facts charged).

Wherefore he prays that his plea be considered and the prayer thereof granted.

R. F.,  
Solicitor, etc.

Answer must be verified by oath.

Under equity rule 39, an answer in support of a plea is not subject to exceptions because it fails to answer all the specific interrogatories attached to the bill. *Hatch v. Bancroft-Thompson Co.* 67 Fed. 802.

## CHAPTER LXXI.

### SETTING DOWN FOR HEARING.

The defendant having filed his plea, the plaintiff must first see if it is in regular form, properly certified and sworn to; if not, he may disregard it, and enter a decree *pro confesso*, or move to strike it from the files. If the plea be regular in form, then equity rule 33 provides the way it shall be tested for sufficiency or truth. *Hatch v. Bancroft-Thompson Co.* 67 Fed. 802.

The plaintiff may set down the plea for hearing. This is in effect a demurrer, as setting it down for hearing admits its truth, but denies its sufficiency (*American Sulphite Pulp Co. v. Babless Pulp & Paper Co.* 163 Fed. 845; *Burrell v. Hackley*, 35 Fed. 833; *Cook v. Sterling Electric Co.* 118 Fed. 45; *Metcalf v. American School Furniture Co.* 122 Fed. 115; *Schnauffer v. Aste*, 148 Fed. 867; *General Electric Co. v. New England Electric Mfg. Co.* 63 C. C. A. 448, 128 Fed. 738; *Raphael v. Trask*, 194 U. S. 276, 48 L. ed. 975, 24 Sup. Ct. Rep. 647; *Stephens v. Smartt*, 172 Fed. 466; *General Electric Co. v. Bullock Electric Mfg. Co.* 138 Fed. 412; *Farley v. Kittson*, 120 U. S. 303-314, 30 L. ed. 684-688, 7 Sup. Ct. Rep. 534; *Kellner v. Mutual L. Ins. Co.* 43 Fed. 626; *United States v. California & O. Land Co.* 148 U. S. 39, 37 L. ed. 359, 13 Sup. Ct. Rep. 458; *Gaines v. Rock Spring Distilling Co.* 179 Fed. 544), and the only question is its legal sufficiency (*Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 421; *Metcalf v. American School Furniture Co.* 122 Fed. 115; *Burrell v. Hackley*, 35 Fed. 833; *General Electric Co. v. New England Electric Mfg. Co.* 123 Fed. 310; *S. C.* 63 C. C. A. 448, 128 Fed. 739; *Rhode Island v. Massachusetts*, 14 Pet. 257-260, 10 L. ed. 445, 446). Setting down for hearing waives want of verification (*Computing Scale Co. v. Moore*, 139 Fed. 200), and defect of form is waived (*Ibid.* See *Farmer's Loan & T. Co. v. Chicago & N. P. R. Co.* 61 Fed.

544; Vacuum Oil Co. v. Eagle Oil Co. 122 Fed. 105; Kellner v. Mutual L. Ins. Co. 43 Fed. 626). There is no such thing in equity pleading as demurring to a plea. Equity rule 33; Zimmerman v. So Relle, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417. If insufficient in law you simply enter an order in the order book in the clerk's office, setting down the plea for hearing. It must be set down for hearing on the rule day it is filed, or the next succeeding rule day. Equity rule 38. If the plaintiff fails to do so, it is an admission that the plea is legally sufficient (Daniels v. Benedict, 38 C. C. A. 592, 97 Fed. 367; see North Chicago Street R. Co. v. Chicago Union Traction Co. 150 Fed. 630), and the defendant can enter an order of course dismissing the bill, or so much thereof as is pleaded to. Objections to irregularity of form is waived by setting down for hearing.

In setting down the plea for hearing you will file with the clerk a precipe as follows:

Title as in bill.

To the clerk of the.....Court, etc.:

You will please set down the plea filed to complainant's bill (or to part of complainant's bill) for hearing on its sufficiency, said hearing to be had at .....on the.....day of ....., A. D. 19..., it being the rule day in.....(month) or as soon thereafter as practicable.

R. F.,  
Solicitor, etc.

In Zimmerman v. So Relle, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 421, it was held that while a demurrer to a plea is irregular, it will be treated as setting it down for hearing.

If not heard at time and place stated in the precipe, and a future date being fixed by the court, then notice must be given to the opposite counsel as to when and where the hearing will take place. If plaintiff neglects to set down the plea for hearing as above stated, or fails to reply, as hereafter explained, then the defendant may dismiss the bill, or so much as is pleaded to, by having an order entered in the order book dismissing it. Equity rule 38.

You address a note to the clerk as follows:

Title as in bill.

To the clerk of the.....Court, etc.:

You will please enter an order dismissing the bill in the above cause as provided by equity rule 38, because of the failure of plaintiff to set down the plea for hearing or to reply to the same under the rules, said plea having been filed on the.....day of ....., A. D. 19....

R. F.,  
Solicitor, etc.

The dismissal being a matter of course, the clerk will enter the dismissal in the order book without notice. Equity rule 38; *Mason v. Hartford*, P. & F. R. Co. 10 Fed. 335.

See that the order of dismissal contains an entry of the facts, such as the date of filing the original bill, the date of filing the plea, the failure of the plaintiff to join issue, or set down the plea for hearing within the time required by the rules, and then the dismissal of the bill because of these facts. After the bill is dismissed, as aforesaid, the plaintiff may seek by motion or petition to reinstate the bill, and the application rests within the discretion of the court. *Ryan v. Seaboard & R. R. Co.* 89 Fed. 402.

### *When Plea to Only Part of the Bill.*

A plea, like a demurrer, will not be held bad if it shall not cover so much of the bill as it might (equity rule 36), nor will it be held bad because the answer filed to a part of the bill does extend to some part of the same matter covered by the plea. Equity rule 37. Prior to this rule, when there was a plea to part, and answer to part, they could not invade each other's territory (*Huntington v. Laidley*, 79 Fed. 867; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 379; see *Re Cooper Bros.* 159 Fed. 958), which led to much difficulty in framing the pleadings, and consequently much delay and injustice. When the plea goes only to a part of the bill, and there is an answer to another part, you should not except to the answer before action on the plea, or you waive the plea.

### *Overruling for Insufficiency.*

When upon the hearing the plea is overruled for insufficiency, the judgment is that the plea be disallowed, and the defendant has a right to answer over (Equity rules 33 and 34;

*MacVeagh v. Denver City Waterworks Co.* 29 C. C. A. 33, 55 U. S. App. 267, 85 Fed. 74; *Chisholm v. Johnson*, 84 Fed. 384; *Wooster v. Blake*, 7 Fed. 816; *Farley v. Kittson*, 120 U. S. 304, 30 L. ed. 684, 7 Sup. Ct. Rep. 534); and the court usually assigns him to answer by the next rule day, or such other time as may be reasonable; but if the court fixes no time, the answer must be filed by the next rule day; and upon failure to answer by that time, or such time as the court indicates, the plaintiff may enter a decree *pro confesso*.

### *Effect of Overruling on Answer.*

In *Pentlarge v. Pentlarge*, 22 Blatchf. 120, 22 Fed. 412, the plea was overruled for insufficiency as a defense and permission refused to permit the same defense in answering over. Equity rule 39 was held not to apply to the conditions. *Miller v. Rickey*, 146 Fed. 576; *Hubbell v. DeLand*, 11 Biss. 382, 14 Fed. 475. This is also true when the plea is determined against the defendant upon an issue of fact, as will be hereafter seen, unless the plea is overruled, as is sometimes done with special permission to renew it in the answer. *Chisholm v. Johnson*, 84 Fed. 384. Again, the court will sometimes permit the plea to remain without final action thereon to be considered as an answer. *Standard Distilling & Distributing Co. v. Woolsey*, 121 Fed. 1017; *Chisholm v. Johnson*, 84 Fed. 384. Again, if the matter set up in the plea is not proper for a plea, or defectively pleaded, the court will permit it to be set up by way of answer, or let it stand over as such. *Pentlarge v. Pentlarge*, 22 Blatchf. 120, 22 Fed. 413.

### *Sustaining the Sufficiency of the Plea.*

If the plea is sustained as sufficient in law, the court will permit the plaintiff to file a replication and put in issue the truth of the plea. *United States v. Dalles Military Road Co.* 140 U. S. 616, 617, 35 L. ed. 565, 11 Sup. Ct. Rep. 988. The judgment is that "the plea be allowed," and order a replication. Rule 34; *Pearce v. Rice*, 142 U. S. 42, 35 L. ed. 931, 12 Sup. Ct. Rep. 130; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 421; *Files v. Brown*, 59 C.

C. A. 403, 124 Fed. 142 and cases cited; Baltimore Trust & Guarantee Co. v. Hofstetter, 29 C. C. A. 35, 56 U. S. App. 122, 85 Fed. 75; see Gunning System v. Buffalo, 157 Fed. 251, 252. And where the plea meets all the allegations of the bill, barring the suit, defendants are entitled to a final decree. Gaines v. Rock Spring Distilling Co. 179 Fed. 544; Horn v. Detroit Dry Dock Co. 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214. If not replied to, it dismisses the bill. Equity rule 38. If the plea be good in part and bad in part, the court will order a replication to the part held good, and overrule the part considered bad. Rhino v. Emery, 79 Fed. 485-486.

### *Issue on the Plea.*

If the plea be regular in form and sufficient, the court will order a replication. This means that you file a denial of the allegations of the plea, called a replication, a form for which may be as follows:

Title as in bill.

And now comes A. B., plaintiff in the above cause, and saving the advantages of any exceptions to the insufficiency of the plea filed herein, says that this bill is true, certain and sufficient to be answered unto, and that the plea filed herein is not true; wherefore he joins issue and prays that the truth of the same may be inquired into.

R. F.,  
Solicitor.

You cannot set up by replication any new matter in confession and avoidance, or any new fact. Mason v. Hartford, P. & F. R. Co. 10 Fed. 334; Equity rule 45. If this condition occurs, you must amend your bill.

### *Effect of Replying to Plea.*

Formerly the effect of replying to a plea, instead of setting it down for hearing, admitted its validity, and if the facts set up in the plea were proven, its effect was to dismiss the bill. Cottle v. Kremenz, 25 Fed. 494; Rhode Island v. Massachusetts, 14 Pet. 257, 10 L. ed. 445; Farley v. Kittson, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; Westervelt v. Library Bureau, 55 C. C. A. 436, 118 Fed. 825. But under



equity rule 33, which allows the defendant the benefit of the truth of the plea as far as in law and equity it should avail, the filing of a replication does not admit the validity of the plea, nor does the fact that the plea is proven necessarily dismiss the bill. *Pearce v. Rice*, 142 U. S. 42, 35 L. ed. 931, 12 Sup. Ct. Rep. 130; *Horn v. Detroit Dry Dock Co.* 150 U. S. 625, 37 L. ed. 1203, 14 Sup. Ct. Rep. 214; *American Graphophone Co. v. Edison Phonograph Works*, 68 Fed. 451; *Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 218; *Dalzell v. Dueber Watch Case Mfg. Co.* 149 U. S. 326, 37 L. ed. 755, 13 Sup. Ct. Rep. 886; *Hartz v. Cleveland Block Co.* 37 C. C. A. 227, 95 Fed. 682. The effect of the plea may on final hearing be avoided by proof of other facts. *Green v. Bogue*, 158 U. S. 478-499, 39 L. ed. 1061-1068, 15 Sup. Ct. Rep. 975; *Soderberg v. Armstrong*, 116 Fed. 710.

### *Nature of Issue.*

The only issue is the truth of the allegations in the plea. *Eveleth v. Southern California R. Co.* 123 Fed. 836; *Farley v. Kittson*, 120 U. S. 315, 30 L. ed. 688, 7 Sup. Ct. Rep. 534; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644; *Hartz v. Cleveland Block Co.* 37 C. C. A. 227, 95 Fed. 682; *Vacuum Oil Co. v. Eagle Oil Co.* 154 Fed. 867; *Birds-eye v. Heilner*, 26 Fed. 147; *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458.

When the replication is filed, which must be on the rule day succeeding the filing of the plea, unless the plea has been set down for hearing on its sufficiency, as before stated, in which event the replication must be filed on the rule day succeeding the judgment of the court sustaining the sufficiency of the plea, the plea is at issue, and you must begin taking testimony within time allowed by equity rule 69, or the plea must be overruled for want of evidence (*Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 29, 26 Fed. 338). The burden is on the defendant (*Sharon v. Hill*, 10 Sawy. 666, 26 Fed. 723; *American Graphophone Co. v. Leeds & C. Co.* 140 Fed. 981); and strict proof must be made (*Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 218). You cannot

prove less than what is alleged, or something different. *United States v. California & O. Land Co.* 148 U. S. 31, 37 L. ed. 354, 13 Sup. Ct. Rep. 458. You proceed with the proof in the same way as upon replication to the answer hereafter to be discussed. Equity rules 66, 67, 68, 69.

*When Plea Not Proven.*

If the plea is not proven, the judgment is that "the plea be not allowed," and the defendant is ordered to answer over to the whole bill, or so much as is covered by the plea. Equity rules 33, 34; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644, *American Graphophone Co. v. Leeds & C. Co.* 140 Fed. 981; *Wooster v. Blake*, 7 Fed. 816; *Files v. Brown*, 59 C. C. A. 403, 124 Fed. 142; *Underwood Typewriter Co. v. Manning*, 165 Fed. 453; *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446; *Westervelt v. Library Bureau*, 55 C. C. A. 436, 118 Fed. 824. In *Sharon v. Hill*, 26 Fed. 341, defendant was not allowed to set up in his answer the issues determined in his plea against him (equity rule 39 does not apply) nor matters held not to be a defense, that were set up in the plea. *Pentlarge v. Pentlarge*, 22 Blatchf. 120, 22 Fed. 412; *Bean v. Clark*, 30 Fed. 225. The answer after the plea is overruled is an absolute right. Equity rule 34; *Sharp v. Reissner*, 20 Blatchf. 10, 9 Fed. 446; see *Westervelt v. Library Bureau*, 55 C. C. A. 436, 118 Fed. 824. But it must be filed within the time required by equity rule 34 (*McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 146, 104 Fed. 709), or fixed by the court, or the bill will be taken as confessed.

In *Kennedy v. Creswell*, 101 U. S. 641, 25 L. ed. 1075, Justice Bradley propounds the interrogatory, whether a defendant who pleads a false plea would be entitled to answer over. He intimates that when defendant has put the plaintiff to the necessity of trying the issue which is found against him, and the delay occasioned thereby, that defendant should not be allowed to answer over, unless plaintiff demands it for further discovery. That finding the plea false, it should stand as an admission of the bill, and if true, the bill should be dismissed. Followed in *Eagle Oil Co. v. Vacuum Oil Co.* 89 C. C. A. 463, 162 Fed. 673. In *Farley v. Kittson*, 120 U. S. 303, 30 L. ed.

684, 7 Sup. Ct. Rep. 534, the court says equity rule 33 modifies this view. A judgment sustaining a plea was overruled in this case, and defendant ordered to answer under Equity rule 34.

In *Earll v. Metropolitan Street R. Co.* 87 Fed. 528, these two cases are reviewed and held not to conflict, but a finding against the plea in this case authorized a decree for plaintiff. *Eagle Oil Co. v. Vacuum Oil Co.* 89 C. C. A. 463, 162 Fed. 671. In *Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 215; *North Chicago Street R. Co. v. Chicago Union Traction Co.* 150 Fed. 629, 630; *Pearce v. Rice*, 142 U. S. 28, 30 L. ed. 925, 12 Sup. Ct. Rep. 130, equity rule 33 is construed, and the same decision reached. *Soderberg v. Armstrong*, 116 Fed. 710.

### *When Plea Proven.*

If the plea is sustained, the judgment is "that the plea be allowed," but under equity rules 33 and 35 the bill is not necessarily dismissed, but will avail the defendant as far as in law and equity it ought to avail. *Pearce v. Rice*, 142 U. S. 28, 30 L. ed. 925, 12 Sup. Ct. Rep. 130; *American Graphophone Co. v. Edison Phonograph Works*, 68 Fed. 451, 452; *Appleton v. Marx*, 10 C. C. A. 555, 23 U. S. App. 420, 62 Fed. 644; *Jones v. Hillis*, 100 Fed. 355; *Elgin Wind Power & Pump Co. v. Nichols*, 12 C. C. A. 578, 24 U. S. App. 542, 65 Fed. 215; *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975; *Soderberg v. Armstrong*, 116 Fed. 710. But if the plea goes to the whole bill, and, its truth being proven, destroys the equity of the bill, and thus bars further proceeding, then defendant is entitled to dismissal. *Ibid.*; *Eveleth v. Southern California R. Co.* 123 Fed. 838 and cases cited; *Horn v. Detroit Dry Dock Co.* 150 U. S. 610, 37 L. ed. 1199, 14 Sup. Ct. Rep. 214; *Earll v. Metropolitan Street R. Co.* 87 Fed. 528; *Daniels v. Benedict*, 38 C. C. A. 592, 97 Fed. 374; *Briggs v. Stroud*, 58 Fed. 720, 721; *Rejall v. Greenhood*, 35 C. C. A. 97, 92 Fed. 945.

Under the old English rule, if the plaintiff replied to a plea in bar, and joined issue on the facts, he thereby admitted the sufficiency of the plea as an answer to his bill; and if the facts

were proven his bill was dismissed, though other equities were set up not put in issue, and which would have been sufficient to save the case from dismissal.

The ruling was absurdly technical, and enforced even when the allegations of the plea were not a proper defense. The theory was that joining issue on the plea was an admission that plaintiff staked his case on the falsity of the plea, and he must accept the consequence. So equity rules 33 and 35 were promulgated in the interest of common sense and justice. *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975; *Edward P. Allis Co. v. Withlacoochee Lumber Co.* 44 C. C. A. 673, 105 Fed. 681, 682.

The courts of the United States never did, in fact, adhere to the old rule. *Green v. Bogue*, 158 U. S. 478, 39 L. ed. 1069, 15 Sup. Ct. Rep. 975. We find in *Hughes v. Blake*, 6 Wheat. 472, 5 L. ed. 308, and *Rhode Island v. Massachusetts*, 14 Pet. 210, 10 L. ed. 423, decided before the adoption of equity rule 33, that the Supreme Court followed in a measure the old rule, but intimated it would be guided by circumstances in applying a judgment sustaining a plea in equity.

Since the adoption of the rule the proper practice, as before said, is to dismiss the bill where the proven plea is an effectual bar to the whole bill (see authorities above); but if the proven plea be not an entire defense to all the equities in the bill, that is, if there are allegations upon which an equity may rest, and which have not been met by the plea, and the plea only defeats a part of the bill, then the bill will be retained and the defendant ordered to answer. *Jones v. Hillis*, 100 Fed. 356; *Green v. Bogue*, 158 U. S. 500, 39 L. ed. 1068, 15 Sup. Ct. Rep. 975; *Pearce v. Rice*, 142 U. S. 41, 35 L. ed. 930, 12 Sup. Ct. Rep. 130; *Farley v. Kittson*, 120 U. S. 314, 30 L. ed. 688, 7 Sup. Ct. Rep. 534. You may withdraw answer to file a plea. *United States v. American Bell Teleph. Co.* 39 Fed. 716.

## CHAPTER LXXII.

### ANSWER.

If the demurrers and pleas are settled, or it is deemed best not to file either, but to submit all matters in bar by answer, you must file it on the next succeeding rule day after appearance has been entered, or the demurrer has been overruled, or the plea has been disallowed, unless further time has on application been fixed by the court. Equity rules 18-34.

### *Framing Answer.*

If you determine to raise the issues by answer, you must answer fully, fairly, and explicitly every allegation of the bill. The effect of this rule is to eliminate many undisputed facts and should always be insisted on through the use of exceptions, as will be hereafter explained. Equity rule 39; *McNulty v. Wiesen*, 130 Fed. 1014; *Commonwealth Title Ins. & T. Co. v. Cummings*, 83 Fed. 767; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *McCloskey v. Barr*, 40 Fed. 559; *Field v. Hastings & B. Co.* 65 Fed. 279. It must not be an argumentative denial either in law or equity. *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 176 Fed. 745.

The rule requires every allegation of the bill to be specifically answered; that is, answered as if each allegation was a direct interrogatory. You cannot allege generally in an answer that every fact in the bill not admitted is denied, but each specific allegation must be denied or admitted, or disposed of by some character of reply. *Brown v. Pierce*, 7 Wall. 211, 212, 19 L. ed. 135, 136; *Holton v. Guinn*, 65 Fed. 451; *People's United States Bank v. Gilson*, 88 C. C. A. 332, 161 Fed. 293. Plaintiff is entitled to see which of his allegations are admitted or denied (*McCloskey v. Barr*, 40 Fed. 559), so that the atten-

tion of the court may be directed to the debatable ground. But while specific answers are required, you must avoid great minutiae in detail; an answer that meets fairly the allegation is sufficient without detailing your evidence. *Field v. Hastings & B. Co.* 65 Fed. 279. The answers, if in the knowledge of the defendant, must be direct and positive; if he has no absolute knowledge, he ought to state his belief, and if he has no belief about the matter charged, he should so state. See *Victor G. Bloede Co. v. Carter*, 148 Fed. 127.

Statements that a defendant has no knowledge, and neither denies nor admits the facts charged in the bill, does not admit their truth or relieve the plaintiff from proving them. *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Rogers v. Marshall*, 13 Fed. 64. Nor would the fact that an allegation in the bill not noticed in the answer admit it. Equity rule 61; *Lovell v. Johnson*, 82 Fed. 206; *Young v. Grundy*, 6 Cranch, 51, 3 L. ed. 149; *Russell v. Clark*, 7 Cranch, 91, 3 L. ed. 279; see *Jones v. Lamar*, 34 Fed. 470. Nor does the fact that a party has no information or belief on the subject admit it (*The Holladay Case*, 27 Fed. 831); but that one should answer that he has no information or belief on a matter of record would be a sham and stricken out on exception. So when the facts are within one's knowledge, he will not be permitted to state them on belief (*Slater v. Maxwell*, 6 Wall. 274, 18 L. ed. 798), nor a want of knowledge of acts done by the defendant cannot be set up. A defendant may plead all facts he has a right to prove, and may even set up the defense in different aspects if it is responsive to the bill. When interrogatories are in the bill (equity rule 44), they must be answered specifically, or reasons for refusing to answer stated clearly. *Boyer v. Keller*, 113 Fed. 580; see *John D. Park & Sons v. Bruen*, 147 Fed. 884.

### *Scandal and Impertinence.*

The answer should be free from scandal and impertinence. However, it will not be suppressed if the allegations of the bill justified it. *United States v. McLaughlin*, 24 Fed. 826; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 379; *Whittemore v. Patten*, 84 Fed. 51; *Barrett v. Twin City Power Co.* 111 Fed. 45; *Pennsylvania Co. v. Bay*, 138 Fed. 206.

Otherwise the impertinence should be stricken out. (Florida Mortg. & Invest. Co. v. Finlayson, 74 Fed. 671; Whittemore v. Patten, 81 Fed. 527; Field v. Hastings & B. Co. 65 Fed. 279); and exceptions for impertinence must be allowed in whole or not at all. Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291. Impertinent allegations cannot be proved by the defendant (Gunne v. Bird, 10 Wall. 308, 19 L. ed. 915; Pennsylvania Co. v. Bay, 138 Fed. 206); nor answer offered as evidence; but they should be excepted to by plaintiff (Hardeman v. Harris, 7 How. 726, 12 L. ed. 889), unless the allegations do not affect the equity of the bill. An answer is impertinent when it appears that the matter alleged is not material, or relevant; or is stated with needless prolixity. Whittemore v. Patten, 84 Fed. 56. Or when not responsive to the bill. Hamlin v. Toledo, St. L. & K. C. R. Co. 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 667. Or when rambling and verbose. Stokes v. Farnsworth, 99 Fed. 838. And when sought to strike out for impertinence, it must be clearly made out. Barrett v. Twin City Power Co. 111 Fed. 45; see Blanton v. Chalmers, 158 Fed. 907.

#### *Inconsistent Matter.*

The answer must not contain inconsistent matter, for, being under oath, neither statement will be considered true, and you lose the benefit of both. Oregonian R. Co. v. Oregon R. & Nav. Co. 27 Fed. 277; Ozark Co. v. Leonard, 24 Fed. 660; Klenk v. Byrne, 143 Fed. 1010. But one may make subsequent modifications of previous allegations, or set up defense in different aspects. Ibid.

#### *Argumentative.*

The answer must never be argumentative. Florida Mortg. & Invest. Co. v. Finlayson, 74 Fed. 671.

#### *Affirmative Matter.*

You cannot expand the denial beyond the facts in the bill (Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291); but you

may set up affirmative matter, though not responsive, if it is a defense to the case made in the bill. *Adams v. Bridgewater Iron Co.* 6 Fed. 179; *Pennsylvania Co. v. Bay*, 138 Fed. 206; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* 43 Fed. 391; *Stokes v. Farnsworth*, 99 Fed. 837; *Mound City Co. v. Castleman*, 171 Fed. 520, and it may be of law as well as fact. *Farmers' Loan & T. Co. v. Northern P. R. Co.* 76 Fed. 15.

### *When Answer Cures Bill.*

Setting up in the answer material facts omitted in the bill cures the bill. *Cavender v. Cavender*, 114 U. S. 471, 29 L. ed. 214, 5 Sup. Ct. Rep. 955; *Provisional Municipality v. Lehman*, 6 C. C. A. 349, 13 U. S. App. 411, 57 Fed. 330; *Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 431.

### *Form of Answer.*

With the statement of these general rules to be observed in framing an answer, I will now give a form for the introduction and conclusion of an answer.

Title as in bill.

The answer of C. D. (or the joint and several answer of C. D. and E. F., defendants) to the bill of complaint.

This defendant (or these defendants) reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill, comes and answers thereto, or to so much thereof as he is advised is material to be answered, and says: (Here take up each allegation of the bill and respond to it, as if specially interrogated, and state such defenses as you have), to so much of the bill as alleges (state allegation) this defendant for answer says (either deny, or admit, or that you have no knowledge, but believe that the same is true or not true, or that you have no knowledge or belief as to the allegation, etc., but demand strict proof, etc.).

When each allegation has been responded to and disposed of, then conclude:

Having thus made full answer to all the matters and things contained in the bill, this defendant prays to be dismissed hence with his costs in behalf incurred.



The only prayer of answer is for dismissal (*Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 27, 28); you cannot pray for affirmative relief. If the nature of the case is such that you are entitled to affirmative relief, this can only be obtained by a cross bill, to be hereafter discussed and explained.

### *Verifying Answer.*

The answer must be sworn to (*Childs v. N. B. Carlstein Co.* 76 Fed. 91; *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001), unless the oath is waived in the bill, as will be further explained. When sworn to, the oath may be taken before any justice or judge of the United States courts, or the judge of any court of a State or Territory, or master in chancery, or commissioner appointed by circuit court to take testimony, and, since 1889, before any notary public. Equity rule 59. By equity rule 91, a party may affirm if he objects conscientiously to taking an oath.

### *Form of Oath.*

State of.....

County of.....

Personally appeared before the undersigned authority **C. D., the defendant** in the above cause, who, being duly sworn, says that he is the defendant in the above cause and that the matters and things contained in said answer are true.

Sworn to and subscribed before me this the.....day of.....  
A. D. 19...

Notary Public or Officer taking.

If matters in the answer are stated on information and belief, you may say: "That he knows the contents of the answer, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those he believes them to be true." When the fact is within defendant's knowledge, it should not be stated on information and belief (*Peacock v. United States*, 60 C. C. A. 389, 125 Fed. 586); if so, the answer is evasive. No attorney's certificate is required to the answer as in the plea. *McGorray v. O'Connor*, 31 C. C. A. 114, 59 U. S. App. 452, 87 Fed. 586. And the signing and verifying an answer, if inadvertently omitted, will  
S. Eq.—28.

be allowed by amendment. *Holton v. Guinn*, 65 Fed. 450; U. S. Rev. Stat. Sec. 954, U. S. Comp. Stat. 1901, p. 696. See "Answer of Corporations."

*When Need Not Answer Fully.*

We have seen **that when** the defendant submits to answer he shall answer fully each allegation of the bill, yet equity rule 39 creates an exception, and declares that one is not bound to answer fully when he may protect himself from discovery by plea. Thus, as stated in the rule, a defendant who could interpose a plea of bona fide purchaser for a valuable consideration without notice may set it up by answer and ignore other allegations of the bill. *Hatch v. Bancroft-Thompson Co.* 67 Fed. 805; *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 29.

You may thus rest your case by answer upon a single issue, and save the expense of the examination of witnesses at large, which prior to the rule could only have been done by plea. It has been held, however, that where there are several defenses to the bill, each one of which may have been set up by plea, that the rule would not apply, and defendant would not be protected from discovery because of such condition. See *Standard Distilling & Distributing Co. v. Woolsey*, 121 Fed. 1017, where several distinct pleas were allowed to stand as an answer.

It thus appears that by equity rule 39 you may insist in your answer on all matters of defense that can be set up by "plea in bar," or which go to the merits of the case. *Holton v. Guinn*, 65 Fed. 450; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 76 Fed. 15; *Von Schroder v. Brittan*, 98 Fed. 169; *Green v. Turner*, 30 C. C. A. 427, 59 U. S. App. 252, 86 Fed. 837. For instance, you may set up fraud inducing the contract. *Ibid.* Under this rule you cannot set up matters only temporarily abating the suit in your answer, or that go to the mere character of the parties, or any irregularity of form in the bill. Equity rule 39.

*May Object to Parties in Answer.*

You may, object by answer or plea to want of parties, as this

would be a bar to a decree in the case, if parties are indispensable. *Howth v. Owens*, 29 Fed. 725; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Carey v. Brown*, 92 U. S. 173, 23 L. ed. 470; *United States v. Gillespie*, 6 Fed. 803. Equity rule 52 recognizes and permits this to be done, but it provides that plaintiff must in *fourteen days* after answer filed set down the cause for hearing on this issue alone, and plaintiff must cause an entry to be made in the order book in the clerk's office as follows: "Set down for hearing on the defendant's objection for the want of parties." If the plaintiff neglects to do so, but proceeds with the cause to hearing without noticing the objection, he will not be allowed to amend his bill and cure defect, unless the court may in its discretion permit it. If the parties are indispensable, the court may dismiss the bill. You see, equity rule 52 must be strictly pursued, or you will find your case hanging alone on the court's discretion.

By equity rule 53 the court may, on hearing the cause, when the defendant objects for the want of parties, not having taken the objection by plea or answer, make a decree saving the rights of absent parties; but this rule clearly refers to only necessary parties or proper parties, whose interests are separable as heretofore shown, because if the absent parties are indispensable, the court cannot proceed. *Barney v. Baltimore*, 6 Wall. 284, 18 L. ed. 825. The court may, however, stop the case until indispensable parties are brought in, otherwise it must be dismissed. *Taylor v. Holmes*, 14 Fed. 515; *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 631, 20 L. ed. 84; *Collins Mfg. Co. v. Ferguson*, 54 Fed. 721; *Shields v. Barrow*, 17 How. 142, 15 L. ed. 161. (See "Parties.") In these cases the dismissal should be without prejudice. *Kendig v. Dean*, 97 U. S. 426, 24 L. ed. 1063; *Keith v. Clark*, 97 U. S. 456, 24 L. ed. 1072; *Goodman v. Niblack*, 102 U. S. 563, 26 L. ed. 232; *House v. Mullen*, 22 Wall. 47, 22 L. ed. 839.

This practice, provided by equity rule 52 for the disposal of the issue of the *want* of parties raised by the answer is so speedy that one need not object to defect of parties by plea, (*United States v. Gillespie*, 6 Fed. 803), but the answer must specify by name or description who the parties are. Equity rules 52 and 53.

## CHAPTER LXXIII.

### EFFECT OF ANSWER.

First. As a pleading.

Second. As evidence.

#### *First, As a Pleading.*

When it answers the merits of the whole bill, it waives all irregularities in all previous proceedings. *Strang v. Richmond*, P. & C. R. Co. 41 C. C. A. 474, 101 Fed. 515; *Huntington v. Laidley*, 79 Fed. 865; *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 84 Fed. 383; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 329; *Marshall v. Otto*, 59 Fed. 249.

It waives all demurrers (*Adams v. Howard*, 20 Blatchf. 38, 9 Fed. 347; *Strang v. Richmond*, P. & C. R. Co. 41 C. C. A. 474, 101 Fed. 511), except that, when there are two or more defendants, the answer of one does not waive the demurrer or plea filed by the other. *Dakin v. Union P. R. Co.* 5 Fed. 665. It cures defective allegations in the bill (*Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423), and waives the defense of "an adequate remedy at law" if not set up (*Moline Malleable Iron Co. v. York Iron Co.* 27 C. C. A. 452, 53 U. S. App. 580, 83 Fed. 66); because this objection must be taken *in limine*, and at the earliest opportunity, as has been before stated. *Kilbourn v. Sunderland*, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; *Tyler v. Savage*, 143 U. S. 97, 36 L. ed. 89, 12 Sup. Ct. Rep. 340; *Reynolds v. Watkins*, 9 C. C. A. 273, 22 U. S. App. 83, 60 Fed. 825. (See "Adequate Remedy," etc.) And it puts in issue the bill, and puts plaintiff on proof except as to matters well pleaded and not denied; but if answer demands proof it must be made. *Klenk v. Byrne*, 143 Fed. 1008. This last case is not the better opinion, though supported by authority; the plaintiff is put on proof, by

the answer of his material allegations, unless admitted; the burden does not cease or shift except when matter in avoidance or new matter is set up in the answer. See *Hanchett v. Blair*, 41 C. C. A. 76, 100 Fed. 821; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Whittemore v. Patten*, 81 Fed. 528. It may, however, take less proof than where the allegation is denied.

### *Second, The Answer as Evidence.*

Unless the oath required to the answer is waived in the bill, the answer, if direct, positive, and responsive, and sworn to, is evidence for the defendant, and its allegations can only be overcome by the testimony of two witnesses, or one witness with corroborating circumstances. *Ford v. Taylor*, 137 Fed. 151; *Vigel v. Hopp*, 104 U. S. 441, 26 L. ed. 765; *Childs v. N. B. Carlstein Co.* 76 Fed. 91; *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; *Jacobs v. Van Sickel*, 61 C. C. A. 598, 127 Fed. 69; *Calivada Colonization Co. v. Hays*, 119 Fed. 202; *Coonrod v. Kelly*, 56 C. C. A. 353, 119 Fed. 841; *Southern Development Co. v. Silva*, 125 U. S. 249, 31 L. ed. 680, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; *Peeler v. Lathrop*, 1 C. C. A. 93, 2 U. S. App. 40, 48 Fed. 788; *McGorray v. O'Connor*, 79 Fed. 863; *Morrison v. Durr*, 122 U. S. 518, 30 L. ed. 1225, 7 Sup. Ct. Rep. 1215. The reason of this rule may be found in the ancient practice of the court of chancery, where the defendant was brought in to purge his conscience in order to discover some fact necessary to the plaintiff's right to relief, the defendant was made a witness by the plaintiff, and when his answers were positive and direct they bound the plaintiff, unless he could overthrow it by two witnesses or by one with corroborating circumstances.

### *Exceptions to the Rule.*

This rule did not apply if the answer was on information and belief. *Berry v. Sawyer*, 19 Fed. 287; *Allen v. O'Donald*, 28 Fed. 17; *Savings L. Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 706. Nor when the allegations are not responsive to the bill. *Allen v. O'Donald*, 28 Fed. 17. A clear and positive denial is necessary to invoke the rule. *Ibid.*; *Berry v.*

Sawyer, 19 Fed. 287; Savings & L. Soc. v. Davidson, 38 C. C. A. 365, 97 Fed. 706; Slater v. Maxwell, 6 Wall. 274, 18 L. ed. 798. Nor does the rule apply when the answer is not strictly responsive. Seitz v. Mitchell, 94 U. S. 582, 24 L. ed. 180. Nor of one defendant against his codefendant. Clark v. Van-Riemsdyk, 9 Cranch, 160, 3 L. ed. 690; Earle v. Art Library Pub. Co. 95 Fed. 544. Nor when it neither admits nor denies an allegation of the bill. Roach v. Summers, 20 Wall. 170, 22 L. ed. 253. Nor when facts are admitted and avoidance set up. Pennsylvania Co. v. Cole, 132 Fed. 676; Clements v. Moore, 6 Wall. 315, 18 L. ed. 789; Reid v. McCallister, 49 Fed. 17; McCoy v. Rhodes, 11 How. 141, 13 L. ed. 638; Clarke v. White, 12 Pet. 190, 9 L. ed. 1051. Nor when new matter is set up as a defense to the bill. Pennsylvania Co. v. Cole, 132 Fed. 668; Roach v. Summers, 20 Wall. 165, 22 L. ed. 252. Nor when the denial is made on belief, or is equivocal or evasive. Slater v. Maxwell, 6 Wall. 274, 18 L. ed. 798; Peacock v. United States, 60 C. C. A. 389, 125 Fed. 586; Berry v. Sawyer, 19 Fed. 291. Nor when there is a want of knowledge, information, or belief. Blair v. Silver Peake Mines, 93 Fed. 332; Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817. See Holladay Case, 27 Fed. 841; Berry v. Sawyer, 19 Fed. 287. Nor when sworn to on information and belief and facts within the knowledge of the defendant. Victor G. Bloede Co. v. Carter, 148 Fed. 127; Thompson v. Seligman, 90 Fed. 220; Peacock v. United States, 60 C. C. A. 389, 125 Fed. 586. Nor when affidavit made by attorney. Lake Shore & M. S. R. Co. v. Felton, 43 C. C. A. 189, 103 Fed. 227.

In all of these cases one witness is sufficient, or circumstances or some evidence. Hanchett v. Blair, 41 C. C. A. 76, 100 Fed. 817; Daniels v. Benedict, 38 C. C. A. 592, 97 Fed. 367. Nor does this rule apply when the answer is by a corporation, and is verified by the oath of one who has no personal knowledge of the facts. Berry v. Sawyer, 19 Fed. 290; United States v. McLaughlin, 24 Fed. 823. See "Answer of Corporation." General allegations made on information and belief, without any verifying circumstances of time and place, even when responsive, are not entitled to much weight. Its only effect is to put plaintiff on proof. Equity rule 41; Blair v. Silver

Peake Mines, 93 Fed. 332; Earle v. Art Library Pub. Co. 95 Fed. 544, 545; Allen v. O'Donald, 28 Fed. 17.

*Effect of Admissions in Answer.*

When the answer admits the fact, no proof is necessary (Robinson v. Philadelphia & R. Co. 28 Fed. 577; Uhlmann v. Arnholt & S. Brewing Co. 41 Fed. 369); for admissions are not affected by the replication. Cavender v. Cavender, 3 McCrary, 158, 8 Fed. 642.

*As Evidence Against Codefendant.*

Answer of one defendant under oath is not evidence against a codefendant, unless jointly interested, or they are parties or privies in estate. Earle v. Art Library Pub. Co. 95 Fed. 544, 545; Clark v. Van Riemsdyk, 9 Cranch, 160, 3 L. ed. 690.

*New Matter in Answer; Effect.*

New matter in answer must be proven by the defendant as original matter, and is not evidence under the rule. Allen v. O'Donald, 28 Fed. 17; Pennsylvania Co. v. Cole, 132 Fed. 668; McCoy v. Rhodes, 11 How. 140, 141, 13 L. ed. 637, 638; Roach v. Summers, 20 Wall. 170, 22 L. ed. 253; Seitz v. Mitchell, 94 U. S. 582, 24 L. ed. 180.

*Effect of Answer When Oath Waived.*

It was said that the answer was evidence unless in the bill the oath is waived. By equity rule 41 it is provided that if oath is waived in the bill, the answer is not evidence, unless the cause is set down for hearing on bill and answer, in which latter case the plaintiff attacks the legal sufficiency as if demurred to.

This waiver may be expressly stated in the bill, or may be waived by a footnote to the bill, in whatever way it is made it is intended to avoid the effect of the answer as evidence. The form in which it is usually stated is as follows:

"That a writ of subpoena shall issue requiring defendant to answer this bill, but not under oath," etc.

Or you may put a footnote to the bill:

"Answer under oath not required, or waived." See *Fisher v. Moog*, 39 Fed. 667.

In *Slessinger v. Buckingham*, 8 Sawy. 454, 17 Fed. 454, Judge Sawyer calls attention to the advantage of waiving the oath, now that U. S. Rev. Stat. Sec. 868, U. S. Comp. Stat. 1901, p. 664, provides that either party to the suit may be examined as a witness. He seems surprised that it is not oftener done, and states his reasons as follows:

"By not waiving the oath, you make the answer evidence against you to be overcome by two witnesses, or one with corroborating circumstances (*Kennedy v. Custer*, 98 C. C. A. 584, 174 Fed. 974; *Conley v. Nailor*, 118 U. S. 130, 30 L. ed. 113, 6 Sup. Ct. Rep. 1001; *Dravo v. Fabel*, 132 U. S. 489, 33 L. ed. 421, 10 Sup. Ct. Rep. 170; *Childs v. N. B. Carlstein Co.* 76 Fed. 91; *Calivada Colonization Co. v. Hays*, 119 Fed. 202; *Coonrod v. Kelly*, 56 C. C. A. 353, 119 Fed. 841; *Jacobs v. Van Sickel*, 123 Fed. 341; *S. C. 61 C. C. A. 598*, 127 Fed. 62); and thus the evidence as thus presented is shaped and stated in a lawyer's office, when you may waive the oath, examine the witness and shape the evidence by cross examination. Again, by making him answer under oath, you give his answers the strength of two witnesses, but examined as a witness, he is only equal to one. Again, if you have evidence outside of the defendant, why give to his answer the extraordinary force it carries by being sworn to, when without oath it simply creates an issue to be proved by the preponderance of evidence." *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Uhlmann v. Arnholt & S. Brewing Co.* 41 Fed. 369.

The waiving the oath does not relieve the plaintiff from proving his case by a preponderance of testimony. *Stewart v. Allen*, 47 Fed. 400. Nor does it, on the other hand, relieve the defendant from answering fully the allegations of the bill (*Hudson v. Wood*, 119 Fed. 764; *Childs v. N. B. Carlstein Co.* 76 Fed. 91; *National Hollow Brake Beam Co. v. Inter-*



changeable Brake Beam Co. 83 Fed. 28; Whittemore v. Pat-ten, 81 Fed. 527; this is doubted in Tillinghast v. Chace, 121 Fed. 436); but it will give the defendant much more latitude in answering, which is a distinct loss to brevity which is sought in probing the defendant's conscience under oath. When oath is waived, the defendant is not required to answer specific interrogatories in the bill. McFarland v. State Sav. Bank, 132 Fed. 401; Excelsior Wooden Pipe Co. v. Seattle, 55 C. C. A. 156, 117 Fed. 140.

*When Answer Evidence Though Oath Waived.*

It was held in Childs v. N. B. Carlstein Co. 76 Fed. 91, that if the answer was sworn to, though the oath was waived, it would have the force of evidence, but this is in conflict with equity rule 41, and against the weight of authority. Calivada Colonization Co. v. Hays, 119 Fed. 202; McFarland v. State Sav. Bank, 132 Fed. 401; Coonrod v. Kelly, 56 C. C. A. 353, 119 Fed. 841. However, the answer can be used as evidence when oath is waived in cases where preliminary injunctions are sought, or other interlocutory orders. Woodruff v. Du-buque & S. C. R. Co. 30 Fed. 91; equity rule 41. And, as said before, it will be taken as true when the cause is set down for hearing on bill and answer. See "Discovery."

*Answer of Corporations.*

The answer of corporations is not required to be under oath, and from this has risen the practice of making officers of the corporation parties, so as to obtain discovery. Continental Nat. Bank v. Heilman, 66 Fed. 184; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co. 83 Fed. 28; Colgate v. Compagnie Francaise du Telegraphe, 23 Blatchf. 86, 23 Fed. 83; Bronson v. La Crosse & M. R. Co. 2 Wall. 302, 17 L. ed. 728. But under equity rule 31 a plea must be verified. Fayer-weather v. Hamilton College, 103 Fed. 547. The corporation answers only under the corporate seal, Continental Nat. Bank v. Heilman, 66 Fed. 184, but, like an individual, must give all the information sought in the bill, and if ignorance is al-leged without excuse, the court will be justified in charging

it with the costs of the suit. *Colgate v. Campagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 83; *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 197; *Game-well Fire Alarm Teleg. Co. v. New York*, 31 Fed. 312.

### *Officers as Parties.*

The joinder of officers who have taken part in the transactions about which the suit is brought is proper, although no decree against them personally can be entered, and if the corporation is dismissed from the suit for want of jurisdiction, or any other cause, no relief can be obtained against the officers, (*Rowbotham v. George P. Steel Iron Co.* 71 Fed. 758), unless a joint liability exists, as when alleged misconduct be part of the purpose of the suit. *Morse v. Bay State Gas Co.* 91 Fed. 944; *Sidway v. Missouri Land & Live Stock Co.* 116 Fed. 386; *Geer v. Matthieson Alkali Works*, 190 U. S. 435, 47 L. ed. 1126, 23 Sup. Ct. Rep. 807. The answer of the corporation should be made by the principal officers, who should be able to admit or deny the allegations of the bill, or state want of knowledge clearly and truly. *Hale v. Continental Ins. Co.* 16 Fed. 718. For this purpose they should be made parties to the bill. *O'Brien v. Champlain Constr. Co.* 107 Fed. 338; *Continental Nat. Bank v. Heilman*, 66 Fed. 184. Answer is not evidence. *United States v. McLaughlin*, 24 Fed. 823.

### *Affirmative Relief in Answer.*

You cannot ask affirmative relief in an answer, the only prayer is for dismissal. *Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 28, top. If you are entitled to affirmative relief in the case, you can only obtain it by *cross bill*. *Chapin v. Walker*, 2 McCrary, 175, 6 Fed. 794; *Hill v. Ryan Grocery Co.* 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 22; *Armstrong v. Chemical Nat. Bank*, 37 Fed. 466; *Lockwood v. Cleaveland*, 6 Fed. 723.

But, as stated before, it is not meant that you cannot set up new matter which is a defense, though not responsive to the allegations of the bill. *Adams v. Bridgewater Iron Co.* 6 Fed.

179; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.* 43 Fed. 391. While this is the rule, yet it has been held that where new matter was set up in the answer, and affirmative relief asked, and the case went to hearing without objection that it should have been set up by cross bill, the court may treat the answer as a cross bill and grant affirmative relief. *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 221, 34 L. ed. 886, 11 Sup. Ct. Rep. 258; *Moran v. Hagerman*, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 500; *Book v. Justice Min. Co.* 58 Fed. 827. See *Lockwood v. Cleaveland*, 6 Fed. 724, and *American Clay Bird Co. v. Ligowski Clap-Pidgeon Co.* 31 Fed. 467; *Bradford v. Union Bank*, 13 How. 69, 70, 14 L. ed. 54, 55.

## CHAPTER LXXIV.

### PROCEDURE AFTER FILING ANSWER.

By equity rule 18 the answer must be filed, unless time extended for cause shown, on the rule day succeeding that of entering his appearance; unless, of course, a demurrer or plea has been filed, then the answer must be filed on the rule day next succeeding the disposition of the plea or demurrer, or at such time as the court may indicate after hearing the plea or demurrer. The answer having been filed within the time prescribed by the rule, the plaintiff has until the next succeeding rule day to do one of three things: First, to set down the cause for hearing on bill and answer; second, to file exceptions to the answer; third, to file a replication to the answer. Should the answer set up a want of parties, prompt action must be taken by the plaintiff, as hereafter indicated, and such action must be taken in advance of the steps above stated as the rule requires action within fourteen days from filing the answer. Equity rule 52.

#### *Setting Down on Bill and Answer.*

Should in your opinion the answer be legally insufficient, you must set down the case for hearing on bill and answer. *Crouch v. Kerr*, 38 Fed. 550; *Banks v. Manchester*, 128 U. S. 251, 32 L. ed. 427, 9 Sup. Ct. Rep. 36. This is equivalent to demurring to the answer, for you cannot file a demurrer to an answer in equity. *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742; *Blanton v. Chalmers*, 158 Fed. 909; *Pennsylvania Co. v. Bay*, 138 Fed. 206; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; *Besson v. Goodman*, 147 Fed. 887; *Barrett v. Twin City Power Co.* 111 Fed. 49. Nor can you reach legal insufficiency by exceptions to the answer or motion to strike out. *Stokes v. Farns-*

worth, 99 Fed. 836. When the case is set down on bill and answer for hearing, it means that you submit to the court the legal sufficiency of the answer; that admitting the facts of the answer to be true as alleged, they show no reason why the relief prayed for in the bill should not be granted. See authorities above. Setting down also waives irregularities in answer that could be met by exceptions. *Besson v. Goodman*, 147 Fed. 887. As stated, there is no such thing as a demurrer to an answer, nor, in fact, to any defensive pleading in equity. If you should file a demurrer, it can on motion be stricken out, or the defendant may disregard it, and enter an order in the order book dismissing the bill after the rule day next succeeding the filing of the answer. *Crouch v. Kerr*, 38 Fed. 550; *Barrett v. Twin City Power Co.* 111 Fed. 45; *Grether v. Wright*, 23 C. C. A. 498, 43 U. S. App. 770, 75 Fed. 742-744; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576.

Setting down on bill and answer, then, raises only an issue of law, and on hearing, the allegations of the answer are considered true for the purpose of arguing the legal effect of the answer. *People's United States Bank v. Gilson*, 88 C. C. A. 332, 161 Fed. 287; *Besson v. Goodman*, 147 Fed. 887; *Robinson v. American Car & Foundry Co.* 132 Fed. 165; *General Electric Co. v. Bullock Electric Mfg. Co.* 138 Fed. 412; *Lake Erie & W. R. Co. v. Indianapolis Nat. Bank*, 65 Fed. 690; *United States v. Trans-Missouri Freight Asso.* 24 L.R.A. 73, 4 Inters. Com. Rep. 443, 7 C. C. A. 15, 19 U. S. App. 36, 58 Fed. 59; *United States v. Ferguson*, 54 Fed. 29; *Iowa v. Illinois*, 147 U. S. 7, 37 L. ed. 57, 13 Sup. Ct. Rep. 239.

### *Answer Admits Case.*

Again, the cause may be set down for hearing on bill and answer if answer admits the case, or when in your opinion the admissions in the answer are sufficient to grant you your relief notwithstanding the denials.

### *When no Replication Filed.*

Again, you may set down for hearing on bill and answer

when ninety days have elapsed after replication and no evidence taken. *McGorray v. O'Connor*, 31 C. C. A. 114, 59 U. S. App. 452, 87 Fed. 586. Or you may set down for hearing after replication filed on pleadings, without evidence in this case the answer is taken as true, and only allegations not denied by the answer will be considered. *Robinson v. American Car & Foundry Co.* 132 Fed. 165, and cases cited.

*Who Must Set Down Case on Bill and Answer.*

The plaintiff must set down the case for hearing on bill and answer, and it must be done on or before the rule day after the answer is filed; but where the motion is for a decree on bill and answer, it can only be heard in open court. *Campbell Printing Press & Mfg. Co. v. Manhattan Elev. R. Co.* 48 Fed. 344.

*Form of Setting Down, etc.*

Title as in bill.

To the clerk of the.....Court of the United States in and for  
.....District of.....:

You will please set down the above cause for hearing on bill and answer to be heard on the.....day of....., A. D., 19..., the same being the rule day in.....(month), or as soon thereafter as practicable.

R. F.,  
Solicitor.

If the purpose is simply to test the legal sufficiency of the answer, it can be heard on any rule day, or in chambers on any day appointed, but if the purpose is to have a final decree entered for the plaintiffs, the cause should be put on the calendar for hearing at the next term of the equity court. *Ibid.* The hearing, being in effect only on the legal sufficiency of the answer, is only a part of the procedure for preparing a case for trial on its merits, all of which can be heard on rule days, or in chambers at such times as the court may appoint.

If the judgment of the court is that the answer is insufficient in law, it will be so entered, and leave given to amend under such terms as the court may direct. If, however, the answer is of such a character that it cannot be amended, the court will still enter a judgment that the answer is insufficient, and hold the case over until the regular term, when a final decree can be

entered in open court. You cannot on motion strike out the answer as a sham, though it be untrue, if it answers the bill. See *Stokes v. Farnsworth*, 99 Fed. 838; *Adams v. Western Maryland R. Co.* 161 Fed. 777.

If the answer should be held **sufficient**, then the plaintiff must ask leave to file a **replication**, and if granted, must file it by the next rule day, or **within** such time as the court may fix. If the plaintiff fails to do so, the defendant may dismiss the bill as of course by filing an order of dismissal with the clerk, a form for which will be given under "Dismissal by the Defendant."

By equity rule 66 the judge may allow on motion for cause shown the replication to be filed *nunc pro tunc*, the plaintiff agreeing to speed the cause and submit to such terms as the court may require. The court will generally permit the replication to be filed if the delay has not retarded the taking of evidence. *Fischer v. Hayes*, 19 Blatchf. 26, 6 Fed. 76. (See "Replication.")

## CHAPTER LXXV.

### EXCEPTIONS TO ANSWER.

If the answers to the bill are not responsive, or if they are evasive, prolix, or otherwise impertinent, you must meet it by exceptions to the answer. Exceptions to an answer are not demurrers, as no questions of law are raised by them. *Barrett v. Twin City Power Co.* 111 Fed. 46; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; *Stokes v. Farnsworth*, 99 Fed. 838. They go to the answer only as evidence, and not as a pleading; and your objections because the answers are not responsive, but evasive or impertinent, are similar to the exceptions you would file to the answers to interrogatories when not responsive, or irrelevant, or any other ground of insufficiency (*Stokes v. Farnsworth*, 99 Fed. 836; *Walker v. Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576), as being argumentative or impertinent. *Barrett v. Twin City Power Co.* 111 Fed. 46; *Schultz v. Phenix Ins. Co.* 77 Fed. 390; *Adams v. Bridgewater Iron Co.* 6 Fed. 180. We see, then, exceptions to an answer raise only the question as to the sufficiency in fact, and not in law, as a response to the charges in the bill, and it is alone with this character of exceptions that the rules of equity deal. When the bill is fully answered, you cannot except for insufficiency because of new matter which is irrelevant, but you may except to the new matter as impertinent. *Barrett v. Twin City Power Co.* 111 Fed. 45; *Pennsylvania Co. v. Bay*, 138 Fed. 206; *Whittemore v. Patten*, 84 Fed. 51; *Green v. Aurora R. Co.* 158 Fed. 909. Nor can you except to an answer for failure to admit or deny an allegation of the bill that is not material. *Peters v. Tonopah Min. Co.* 120 Fed. 587.

When bills of discovery were necessary and common, or seeking discovery through interrogatories in the bills (equity rules



41, 42, 43), and the defendant thus required to testify in behalf of plaintiff, the plaintiff had a right to demand direct and specific answers to each interrogatory, as if defendant was on the stand testifying. Exception then to irresponsible or evasive answers was the only method by which the attention of the court was called to the answers, and the defendant made to answer directly. It is now strenuously urged that exceptions to an answer in equity are no longer necessary, as there is no longer any use for bills of discovery, or seeking information through interrogatories in the bill, because parties can testify and you may examine them as any other witness, and as the reason of the rule has ceased, the rule should be abolished. *Ex parte Boyd*, 105 U. S. 657, 26 L. ed. 1204; *Field v. Hastings & B. Co.* 65 Fed. 279.

In *United States v. McLaughlin*, 24 Fed. 825, the court says that filing exceptions is a useless waste of time. It asks, why press the defendant to a direct denial under oath, which sustains his case, and you are forced to overcome it by more evidence than is necessary otherwise. It was further decided in this case, that exceptions for insufficiency only applied to matters of discovery where it was necessary for plaintiff to rely on the defendant for evidence to prove his case, and that the foundation for an exception was a sufficient allegation, and a sufficient interrogatory, but that when the bill was simply for relief, and sought no discovery by direct interrogatories, or when the oath to the answer was waived, that exceptions to the answer would not lie.

This reasoning led up to the conclusion that inasmuch as the answer of a corporation was under seal, and not under oath, no exceptions would lie to it. *Ibid.* In *Field v. Hastings & B. Co.* 65 Fed. 279, Judge Shiras says that since parties to a suit have been made witnesses and discovery become obsolete, and the rules for testing answers wherein discovery was sought are no longer guides for determining their sufficiency, the question now is whether the answer is sufficient as a pleading, and not as a response to an interrogatory.

I have thus given the objections that have been interposed to the further use of exceptions; yet there are other conditions that may be considered, for still retaining the practice. It will be noticed that while equity rule 40 provides that it is not now

necessary to interrogate the defendant in the bill (*Whittemore v. Patten*, 84 Fed. 53), yet by equity rules 41, 42, 43, 44 the practice is still provided for.

By equity rule 61 the plaintiff is allowed until the rule day succeeding the filing of the answer to except to it for insufficiency. Thus we see that, notwithstanding the fact the statute permits parties to testify, yet the Supreme Court has not changed this rule requiring exceptions to be filed, or the answer will be taken as sufficient. Exceptions are often necessary to bring out the fact that the answer is insufficient as a defense, and you are justified in setting down the case on bill and answer without taking further testimony. Again, an interrogatory may be adroitly put in a bill, which, with the aid of exceptions to force a direct answer, may end the litigation.

### *Effect of Waiving Oath on Exceptions to Answer.*

The fact that oath to an answer is waived does not deprive you of the right to file exceptions to the answer, and equity rule 41 does not mean that any admissions you may force from your adversary by exceptions properly made would not be as effective as evidence, as if they were sworn to. *Whittemore v. Patten*, 81 Fed. 527; *Field v. Hastings & B. Co.* 65 Fed. 279; *John Church Co. v. Zimmermann*, 131 Fed. 653, see *Barrett v. Twin City Power Co.* 111 Fed. 46, 47. See *Contra Tillinghast v. Chace*, 121 Fed. 436. If the waiver of an oath prevented exceptions, then a corporation which answers under seal could by shuffling evasion avoid explicit answers, and leave you to pursue indecisive issues. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Gamewell Fire-Alarm Tel. Co. v. New York*, 31 Fed. 312; *Colgate v. Compagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 82.

Again, exceptions to an answer are not confined to bills of discovery. The complainant is entitled to an answer to every material allegation of his bill, whether oath waived or not. He has a right to know what is admitted and what denied and what he must prove (*McClaskey v. Barr*, 40 Fed. 511; *Whittemore v. Patten*, 81 Fed. 528), and there is no more efficient way to

do it than by exceptions to the answer, but exceptions must go to material allegations. *Peters v. Tonopah Min. Co.* 120 Fed. 587; *Brown v. Pierce*, 7 Wall. 211, 212, 19 L. ed. 135, 136; *Commonwealth Title Ins. & T. Co. v. Cummings*, 83 Fed. 768.

Before passing on, I will state that it has been held that a *motion* to strike out portions of an answer that are evasive or objectionable is an appropriate remedy. *Peacock v. United States*, 60 C. C. A. 389, 125 Fed. 586, and authorities cited. However, while discretionary with the court, it should not be encouraged.

### *Form of Exceptions.*

Having concluded to except to the answer, you can use the following form:

Title as in bill.

Exceptions of A. B., plaintiff, to the answer of C. D., defendant, for insufficiency, etc.

And now comes the plaintiff and excepts to the answer of the defendant filed herein and for cause of exception shows:

First. That defendant has not answered to the best of his knowledge, remembrance, information, and belief, whether, etc.

Second. That the answer of the defendant to the allegation of the bill charging, etc., is evasive and not responsive, etc.

Third. That the answer of the defendant to, etc., is scandalous and impertinent in this, etc.

In all of which particulars plaintiff excepts, because by reason thereof said answer is irresponsive, evasive, imperfect and insufficient, and plaintiff prays that defendant be compelled to put in a full and sufficient answer to the matters herein complained of.

R. F.,  
Solicitor

Your exception should set forth the charges in the bill, and the answers as made that are excepted to, and showing in what the insufficiency consists, or that it is obnoxious to the objection made. *Equity rules* 27, 61, 65; *Schultz v. Phenix Ins. Co.* 77 Fed. 376; *Fuller v. Knapp*, 24 Fed. 100; *Whittemore v. Patten*, 84 Fed. 53; *Bower Barff Rustless Iron Co. v. Wells*

Rustless Iron Co. 43 Fed. 391; Blanton v. Chalmers, 158 Fed. 907,—illustrative cases. Exceptions for scandal and impertinence will not be sustained if the bill justifies it. Equity rule 27; Comstock v. Herron, 45 Fed. 661. An answer is impertinent and liable to exception when it is apparent that the matter set up is not material or relevant, or is stated with needless prolixity. Pennsylvania Co. v. Bay, 138 Fed. 206; Greene v. Aurora Co. 158 Fed. 908.

This last exception is not favored, because if the matter set up *might* be material the exception will not be sustained; or if struck out and it afterwards should appear material on the final trial, the court could not remedy it, and if immaterial the court can disregard it on the trial.

Again, when new matter is set up in the answer, though it be not responsive to any allegation of the bill, yet if it sets up a substantial defense it cannot be excepted to because irresponsible. Ibid. And if the paragraph of the answer excepted to is partly good, an exception to the whole will not lie. Board of Trade v. National Bd. of Trade, 154 Fed. 238. See Dr. Miles Medical Co. v. Snellenburg, 152 Fed. 662.

When an answer has a wrong title, or is not sworn to, an exception will not lie; you must move to strike the answer from the files. Osgood v. A. S. Aloe Instrument Co. 69 Fed. 291. So when the allegations of the bill are immaterial, exceptions will not lie, because they are not answered. Hardeman v. Harris, 7 How. 728, 729, 12 L. ed. 889, 890; Peters v. Tonopah Min. Co. 120 Fed. 587. A liberal construction is given to the answer when excepted to.

### *When Exceptions to Be Filed.*

You must file your exceptions on the rule day after the answer has been filed, unless further time has been granted on motion showing cause (equity rule 61), and upon failure to file exceptions, the answer is taken as sufficient.

If the defendant does not submit to the exceptions, and amend his answer by the next rule day after they are filed, as he may do under equity rule 63, then the plaintiff must set down the exceptions for hearing on the rule day succeeding the

rule day upon which defendant may have filed his amended answer. Equity rule 63.

*Set for Hearing.*

You must set down the exceptions for hearing as follows:

Title as in bill.

To the Clerk, etc.:

You will please enter an order setting down the exceptions filed herein to the answer of defendant for hearing before the Hon....., judge, etc., on the.....day of....., A. D. 19..., it being the rule day in .....(month) and the rule day succeeding the failure of the defendant to submit to the exceptions and amend his answer under equity rule 63.

R. F.,  
Solicitor.

Plaintiff should be explicit in this notice: First, because a failure to set down the exceptions for hearing under the rule would be an abandonment of his exceptions and the answer held sufficient.

Second. The rule requires the exceptions to be heard on a rule day, and not any other day. *La Vega v. Lapsley*, 1 Woods, 428, Fed. Cas. No. 8,123.

Third. They must be heard by a judge of the court. Equity rules 61-65.

Of course you may on application have the time for hearing enlarged, or you may withdraw your exceptions and be permitted to file a replication, but otherwise a failure to pursue the rule strictly abandons your exceptions. *American Loan & T. Co. v. East & West R. Co.* 40 Fed. 384.

*Exceptions Sustained.*

If your exceptions are heard and sustained, the defendant is ruled for a better answer by the next rule day, or such time as the court may order, which may be before or after the next rule day. *Dr. Miles Medical Co. v. Snellenburg*, 152 Fed. 661. If defendant does not amend, and answer with the required fullness, plaintiff may do one of two things. He may enter an order taking the bill as confessed, or if the answer is

necessary to obtain complete relief, or to determine the extent of his decree, then the process of contempt may be used to force an answer. Equity rules 64-18, and see equity rule 39.

### *Exceptions Overruled.*

If the exceptions are overruled, the plaintiff may either set down the cause for hearing on bill and answer, or file a replication, and this must be done on the rule day succeeding the overruling of the exceptions (equity rule 66), or defendant will be entitled to a dismissal of the suit, unless, for cause shown, the judge allows the filing of a replication nunc pro tunc, the plaintiff submitting to speed the cause. Whether the exceptions be sustained or overruled, the prevailing party is entitled to all the costs occasioned thereby, unless otherwise ordered. Equity rule 65.

### *Exceptions to Answer of Corporations.*

Although corporations do not answer under oath, exceptions lie to compel a full answer. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* 83 Fed. 28; *Gamewell Fire-Alarm Tel. Co. v. New York*, 31 Fed. 313; *Whittemore v. Patten*, 81 Fed. 528; *Colgate v. Compagnie Francaise du Telegraphe*, 23 Blatchf. 86, 23 Fed. 83.

## CHAPTER LXXVI.

### AMENDING ANSWER.

Equity rule 60 provides that an answer may be amended as of course in any matters of form, or filling up a blank, or correcting a date, or reference to a document, or other small matter, at any time before the cause is set down for hearing on bill and answer, or before a replication is filed; but whatever amendment is made the answer must be resworn. *Gubbins v. Laughtenschlager*, 75 Fed. 615; *Schultz v. Phenix Ins. Co.* 77 Fed. 389, 390. See *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, and *Eberly v. Moore*, 24 How. 147, 16 L. ed. 612, as to the discretion of the court in amending. After setting down for hearing, or after replication, you cannot amend in any material matter, as by adding new facts or defenses, or by qualifying or altering the original answer, unless by leave of the court if in session, or by the judge if in vacation. *Gubbins v. Laughtenschlager*, 75 Fed. 615; *Bass v. Christian Feigenspan*, 82 Fed. 260. You must make the application by motion showing cause for the amendment, and supported, if required, by affidavit, and due notice given to the adverse party. When the court gives the leave to amend, he may order the amendment separately engrossed and added as a distinct amendment to the original answer, so as to be distinguished therefrom. Equity rule 60; U. S. Rev. Stat. Sects. 754, 954, U. S. Comp Stat. 1901, pp. 593, 696; *United States v. American Bell Teleph. Co.* 39 Fed. 716.

Equity rule 63 provides that the defendant may amend his answer when he admits the exceptions taken by plaintiff.

Equity rule 64 provides that if the exceptions be sustained on hearing, the defendant may amend by putting in a complete answer.

Equity rule 46 provides that when an amendment to the bill

shall be made after answer filed, the defendant shall put in a new or supplemental answer. *Perkins v. Hendryx*, 31 Fed. 522.

Thus having grouped the rules affecting amendments to answers, it is seen that an amendment lies *of course* before setting down for hearing on bill and answer, which we have seen is in effect a demurrer to the answer, or before filing a replication which puts the answer in issue. These amendments can be made in any manner not involving the injection of new matter in the answer, or changing the allegations of the answer, but even when the amendments are made with reference to formal matters the answer must be resworn. Formal amendments are simply filed in the clerk's office and made a part of the record (equity rule 60), but no material amendment can be made to the answer after filing it, without application to the court, and if the amendment is sought after setting down for *hearing* on bill and answer or *after replication*, you must not only make application to the court, but must serve a notice of the application and amendment on opposite counsel, and the time and place the application will be made.

The application may be made in vacation or term time, and in the following manner:

Title as in bill.

And now comes C. D., the defendant in the above cause, and moves the court for leave to file the following amendments to the answer filed in this cause on the.....day of....., A. D. 19..., to wit: On second line of first page, after words "and defendant," insert the following allegation (state it); and on sixth line of seventh page expunge all after the words, etc., to the words, etc., or expunge and insert (state it).

That said amendments are material and necessary to a proper defense of the case, and that the matters set up by way of amendment were not known to defendant prior to filing the original answer (or, if known, show that they were not incorporated through inadvertence or mistake, or perhaps the materiality may have arisen since filing the original answer).

Wherefore he prays that said amendments be allowed and be considered as a part of the answer on the hearing of the cause.

R. F.,  
Solicitor.

If the amendment makes a material alteration in the allegation, or if new facts are added, the motion should be sworn to



by the defendant. *Schultz v. Phenix Ins. Co.* 77 Fed. 389, as to affidavit. *Ibid.* 388.

Notice of the motion must be given to the adverse party as follows:

To A. B., Plaintiff, or E. S., his Counsel of Record:

Please take notice that I have filed a motion for leave to amend the answer heretofore filed by the defendant in this cause, a copy of which motion containing the amendments sought is hereto attached for your information.

I will present said motion on the.....day of....., A. D. 19..., or as soon thereafter as practicable, to his Honor, judge, etc., at.....

R. F.,  
Solicitor.

You may file the motion and attach a copy of the amendments sought both to the motion and notice. *Ibid.*; *Stokes v. Farnsworth*, 99 Fed. 837.

If the order to amend is granted by the court, prepare it as follows:

Title as in bill.

This cause coming on to be heard in chambers (or in open court) on the motion of defendant to amend his answer, and both parties having appeared (or it appearing that notice was served on plaintiff and he came not), and the court being fully advised of the amendments sought to be made to the answer of defendant heretofore filed in this cause on the.....day of....., A. D. 19..., it is hereby ordered, adjudged, and decreed that the motion be granted and that the amendments as set forth in the motion be separately engrossed (unless they are so presented with the motion), and the clerk of the court is hereby ordered to file the same as of the date of this order as amendments to the original answer.

Judge, etc.

This and all other forms given are mere general directions in the successive steps of a suit in equity, which you may use or improve upon, as you deem best.

The order will be entered by the clerk as a part of the proceedings, and the amendments will be filed by him as a pleading in the cause.

The courts apply a somewhat different rule in granting amendments to answers than in granting them to bills. The

answer, unless oath is waived, is a sworn declaration of a party as if on the stand testifying to charges made by him, or to questions material to the issue. Once the answer is filed and sworn to, amendments will not ordinarily be permitted when they are rendered necessary by negligence, inattention, or the indifference of the defendant. Being a sworn defense, the reason for amendments must be cogent and satisfactory, and it must appear that the fact to be added, or the statement to be altered, or mistake to be corrected, must be both material and probable. *Gardner v. Crossman*, 11 Fed. 851.

Again, when the facts sought to be set up by amendment were known to the defendant when the answer was filed, the court should hesitate before permitting the litigant to experiment with the court's discretion. *Gubbins v. Laughtenschlager*, 75 Fed. 624; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; *Cross v. Morgan*, 6 Fed. 244, 245. An amendment that conflicts with allegations in the original answer should not be permitted. They cannot both be true; and it is permitting one under oath to juggle with the truth, if allowed. It is a rule that when in equity conflicts occur in allegations, the court resolves the doubt by striking out both allegations. *Ozark Land Co. v. Leonard*, 24 Fed. 660. If a mistake has been made in an allegation, you should apply to amend by expunging the original allegation and substituting for it the true allegation, and in such amendment you must explain the mistake if the answer is sworn to. See "Supplemental Answer." Of course, an answer may be amended by consent. *Stokes v. Farnsworth*, 99 Fed. 836.

Such are the general guides to amending answers. While it is admitted that many cases have arisen in which Federal judges have not followed the rules, or recognized any limitations on their discretion, yet such action is only the law of the particular case, and cannot be considered authority to be followed; it only tends to emphasize a somewhat prevalent idea that what you may or may not do in an equity suit in a Federal court depends on the condition of the judge's conscience, and not upon rule.

It is regretted that there is abundant reason for saying that equity practice is uncertain, but much of the uncertainty with which it is surrounded has arisen from an ignorance of the

rules, both by judges and counsel. It is a failure to follow the rules, or require a strict adherence to them, that produces inextricable confusion, and the inevitable sword of discretion must come to the rescue, and cut the Gordian knot. Thus we have precedent set up unsupported by rule or reason.

I am aware that a fixed rule cannot apply to all cases, and that the ends of justice should not be sacrificed to form, or the rigidity of an ordinance. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141, 5 Sup. Ct. Rep. 771, yet this does not justify an abandonment of all effort to make counsel follow the rules and ordinances that the wisdom of the past has formulated as the best and most expeditious way of maturing a case in equity for final hearing. If the Federal judges would require a stricter adherence to the rules in equity than now prevails, and withhold their discretion, when ignorance or negligence has been the cause of some default in the progress of an equity suit, it would soon remove the reproach of uncertainty and infinity that attaches to a cause when it gets into "chancery."

#### *Amendment After Cause Ready for Hearing.*

An amendment to an answer after cause is ready for hearing should rarely ever be permitted, especially where the amendment makes substantially a new defense. *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 529; *Southern R. Co. v. North Carolina Corp. Commission*, 105 Fed. 270; *Walden v. Bodley*, 14 Pet. 160, 10 L. ed. 400; *Hicks v. Otto*, 85 Fed. 728; *Spill v. Celluloid Mfg. Co.* 22 Blatchf. 441, 22 Fed. 96. Thus in *Salisbury v. Bennett*, 72 Fed. 743, leave to amend by setting up the statute of limitation was refused. Amendments of this character, of course, must be addressed to the sound discretion of the court, but there must be strong reasons to justify the delay that would be occasioned by permitting it; the conditions surrounding and the evidence taken in the case will be looked to, to determine the matter. *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522-529; equity rule 60; *Ibid.* In *Hamilton v. Southern Nevada Gold & S. Min. Co.* 33 Fed. 568, 15 Mor. Min. Rep. 314, a party was permitted to amend an answer at the hearing to conform to the proof, but a refusal to amend after hearing was held in

Roberts v. Northern P. R. Co. 158 U. S. 26, 39 L. ed. 882, 15 Sup. Ct. Rep. 756, not to be error. See illustrative case, Naretti v. Scully, 131 Fed. 399.

(See Amending Bill, Chapt. 61 at and after trial.)

### *Supplemental Answer.*

By equity rule 46 it is provided that in every case where an amendment shall be made to the bill after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day. Perkins v. Hendryx, 31 Fed. 523.

Again, a supplemental answer may be filed when defendant discovers that he has made a mistake, or unintentionally misstated a fact in his original answer, but as before stated, this may also be done by amendment.

### *Form for Demurring, Pleading, and Answering at the Same Time.*

Having now given the forms and rules for demurring, pleading, or answering in equity, I will now give a general form for demurring to a part, pleading to a part and answering to a part of the bill at the same time, which we have seen can be done.

Title as in bill.

#### I.

And now comes the defendant and, not admitting any of the matters contained in the bill to be true as alleged, demurs to so much of the bill as sets forth (here state part of bill demurred to) and for cause of demurrer shows (here set forth cause).

Wherefore he prays judgment of the court whether he shall be required to answer further the parts of the bill demurred to.

Oath and certificate.

R. F.,  
Solicitor.

#### II.

And without waiving the foregoing demurrer, but relying thereon, defendant says that so much of the said bill as alleges (here insert part of bill to which you plead), he comes and plead thereto and doth aver (here

set forth grounds of plea), and defendant prays the court whether he shall further answer the part of the bill here pleaded to.

Oath and certificate.

R. F.,  
Solicitor.

### III.

And defendant, not waiving either the plea or demurrer for answer to the residue of the bill, or so much thereof as he is advised is material to be answered, comes and says (here answer the residue and set forth such other matters as may be a defense to the part answered).

Wherefore defendant prays to be dismissed with costs, etc.

**Verification.**

R. F.,  
**Solicitor.**

## CHAPTER LXXVII.

### REPLICATION.

Before taking up the discussion of the cross bill, which is in the nature of an answer, I will discuss the last step in the pleading which fixes the issues, and prepares the case for taking testimony. This pleading is called a "replication."

After the answer has been filed, you have until the next rule day to file a replication, unless you set down for hearing on bill and answer, or except to the answer. Whatever proceeding you take, you have always until the next rule day succeeding the disposition by the court of the proceeding taken by you to file your replication, unless the court should fix another time.

Equity rule 66 provides that when the answer has not been excepted to, or shall be deemed sufficient, the plaintiff shall file the general replication on or before the next succeeding rule day thereafter, and upon filing the replication the cause shall be deemed at issue without further pleading on either side. *Heyman v. Uhlman*, 34 Fed. 686; *Hendrickson v. Bradley*, 29 C. C. A. 303, 55 U. S. App. 715, 85 Fed. 508. If the plaintiff shall omit to file such replication, the defendant shall be entitled as of course to an order dismissing the suit. *Ibid.* See Chap. 78 for form of dismissal. *Harrington v. Union Oil Co.* 144 Fed. 235; see *United States v. Barber Lumber Co.* 169 Fed. 184. But not after the cause has been set down for hearing on bill and answer. *Reynolds v. First Nat. Bank*, 112 U. S. 409, 28 L. ed. 735, 5 Sup. Ct. Rep. 213.

### *Effect of Replication*

It denies every allegation of the answer on plea not responsive to the bill, and puts defendant on proof. *Cavender v. Cavender*, 3 McCrary, 158, 8 Fed. 641; *Lewis Pub. Co. v. Wyman*, 168 Fed. 756; *Humes v. Scruggs*, 94 U. S. 22, 24

L. ed. 51; *Stratton v. Essex County Park Commission*, 64 Fed. 901. The legal sufficiency of the answer is waived (*Sprague v. Provident Sav. & Trust. Co.* 90 C. C. A. 71, 163 Fed. 452; see *McAleer v. Lewis*, 75 Fed. 734; *Perry v. Godbe*, 82 Fed. 141); but no substantial insufficiency as an answer or plea as to the facts set forth to constitute a defense (*Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1-5 and cases cited. See *Green v. Bogue*, 158 U. S. 478-499, 39 L. ed. 1061-1068, 15 Sup. Ct. Rep. 975).

Again, we have seen that where a case is set down for hearing on bill and answer, all the facts well pleaded in the answer are taken as true, whether responsive or not. *Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36. But where a replication has been filed to the answer, and the case set down for hearing on bill, answer, and replication, then only those allegations of the answer that are responsive to the bill are taken as true. All matters pleaded in avoidance, and new matter in the answer not responsive, are taken as untrue. *People's United States Bank v. Gilson*, 88 C. C. A. 332, 161 Fed. 291.

Equity rule 45 provides that no special replication to any answer shall be filed, but if any matter alleged in the answer shall make it necessary, the plaintiff must amend his bill to meet the matter set up in the answer and he may have leave to amend his bill, with or without cost, as the judge may direct. So we see that the office of a replication is simply to put in issue the answer and assert the truth of the original bill. All pleading ceases, and you are ready to begin taking testimony.

The replication is in the following form:

Title as in bill.

And now comes A. B., plaintiff in the above cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient.

Wherefore he prays relief as set forth in his original bill.

R. F.,  
Solicitor.

You must remember two things in preparing and filing your replication:

First. That the replication cannot be used to set up new matter, or matter in confession and avoidance of the answer; if you do, the replication can be stricken out on motion and your bill dismissed as of course, if further time to file it is not granted by the court. *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 334; *Vattier v. Hinde*, 7 Pet. 274, 8 L. ed. 683.

If there is an allegation in the answer to be met by confession and avoidance, you must amend your bill, you cannot set it up in the replication; so if there be new matter in the answer to be met, you must do it by amendment of your bill, and not in your replication, and to amend for these purposes special leave of the court must be obtained. Equity rule 45.

If a statute is pleaded in the answer, and you wish to bring yourself within its exceptions, if any, you must set it up by amending your bill. *Vattier v. Hinde*, 7 Pet. 274, 8 L. ed. 683; *Mason v. Hartford, P. & F. R. Co.* 10 Fed. 335. If there are many defendants and they file separate answers, you must file separate replications to each answer, without reference to the state of the pleadings of any other defendant, or the stage in the cause they have reached. The further effect of the general replication is to admit the legal sufficiency of the answer. Equity rule 38.

Second. The replication must be filed in the time required by the rule as given above, or your bill can be dismissed as of course. *Blue Ridge Clay & Retort Co. v. Floyd-Jones*, 26 Fed. 817; *Hendrickson v. Bradley*, 85 Fed. 509; *Heyman v. Uhlman*, 34 Fed. 686; *Harrington v. Union Oil Co.* 144 Fed. 235. But court may permit it filed *nunc pro tunc*. *Fischer v. Hayes*, 19 Blatchf. 26, 6 Fed. 76; *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*), 10 Wall. 302, 19 L. ed. 895.

The replication must be general, simply putting in issue the facts stated in the answer, whether of new matter or otherwise. *Humes v. Scruggs*, 94 U. S. 24-28, 24 L. ed. 52-54; *Stratton v. Essex County Park Commission*, 164 Fed. 901. It cannot be used as an exception. *Robinson v. American Car Co.* 68 C. C. A. 331, 135 Fed. 693. But while it is thus a general denial, it does not deprive plaintiff of the benefit of the ad-



missions in the answer. *Cavender v. Cavender*, 3 McCrary, 158, 8 Fed. 641. As said, the replication ends the pleadings. You cannot demur to a replication. *United States v. Coos Bay Wagon Road Co.* 110 Fed. 865. But while you cannot demur, you may move to strike out. *Stratton v. Essex County Park Commission*, 164 Fed. 903. While it is irregular to go to trial without a replication, yet if the case has been heard without objection on this ground, it will not be noticed. *Washington A. & G. R. Co. v. Bradley* (*Washington A. & G. R. Co. v. Washington*), 10 Wall. 302, 19 L. ed. 895; *J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 437, 36 L. ed. 496, 12 Sup. Ct. Rep. 669.

S. Eq.—30.

## CHAPTER LXXVIII.

### DISMISSAL OF THE CASE BY DEFENDANT.

Having discussed the order of pleading in equity, I will here call your attention to the equity rules providing for a dismissal of the case by defendant during the successive steps in the pleading.

By equity rule 38 it is provided that if the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule day when the same is filed, or the next rule day succeeding, he shall be deemed to admit the truth or sufficiency of said plea or demurrer, and his bill shall be dismissed as of course by the defendant, unless further time is allowed by the judge.

By equity rule 66 when the plaintiff fails to file a replication within the time required, the defendant shall be entitled to an order as of course for the dismissal of the bill, and the suit shall thereupon stand dismissed, unless for cause shown the court upon motion shall allow a replication to be filed *nunc pro tunc*. Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 837.

These rules for dismissal are explicit, and need no explanation further than has been given. A form for dismissal under equity rule 38 has already been given.

Under equity rule 66 you address the following notice to the clerk:

To the Clerk, etc.:

The plaintiff in the above cause having failed to file a replication to the answer heretofore filed on the.....day of....., A. D. 19..., by the defendant, as required under equity rule 66, you will please enter an order dismissing the suit as authorized by said rule.

R. F.,  
Solicitor.

After this order has been entered in the order book in the clerk's office, the plaintiff will not be permitted to file his replication except upon motion for cause shown, which, when not apparent of record, must be supported by affidavit.

Again, when the answer completely denies all the equities in the bill, and the plaintiff files no replication putting in issue the allegations of the answer, the bill will be dismissed on motion by the defendant for want of equity. *Parker v. Concord*, 39 Fed. 718. The defendant may move to dismiss the suit when the want of jurisdiction is apparent, instead of demurring; especially is this proper when it is probable that the defect cannot be cured by amendment, as it is more expeditious.

So after the evidence is taken and the cause fully prepared for final hearing, if it is developed in the evidence that the court is without jurisdiction on the ground alleged, the defendant may by motion have the bill and proceedings dismissed. In either case you may use the following form:

Title as in bill.

And now comes the defendant and moves the court to dismiss the bill filed in this cause with the proceedings had thereon, because it appears from said bill (or from the evidence, etc.) that this court has no jurisdiction in said cause, for that

First. Because of want of diversity of citizenship, etc. (or it appears from the evidence that the diversity, etc.), upon which the suit is based is not alleged or shown.

Second. No Federal question is shown, etc.

Third. That the amount or value does not exceed, etc. (or whatever may be the ground for dismissal).

Wherefore defendant prays that the bill and proceedings had thereon be dismissed.

R. F.,  
Solicitor.

This motion may be filed at any time during the progress of the cause. *Vannerson v. Leverett*, 31 Fed. 376; *Blythe v. Hinckley*, 84 Fed. 246; *Simon v. House*, 46 Fed. 319, 320; *United States ex rel. McIntosh v. Crawford*, 47 Fed. 566; *Covert v. Waldron*, 33 Fed. 311; *Morris v. Gilmer*, 129 U. S. 325, 32 L. ed. 693, 9 Sup. Ct. Rep. 289. There is no particular mode prescribed by which the fact should be brought to the attention of the court, but, however done, due notice to the

parties to be affected by the dismissal should be given. Ibid. 326. See *Mackaye v. Mallory*, 80 Fed. 256, when defendant cannot dismiss for want of prosecution.

*Death of Complainant.*

The representatives of the deceased may revive the suit, but if no steps are taken in a reasonable time to do so, the defendant may move to dismiss. *Brown v. Fletcher*, 140 Fed. 639. Again a codefendant may move to dismiss where complainant has not brought before the court a necessary party named as defendant in the bill. *Jessup v. Illinois C. R. Co.* 36 Fed. 735; *Jackson v. Hooper*, 171 Fed. 597.

## CHAPTER LXXIX.

### CROSS BILL.

#### *Nature of.*

A cross bill is in the nature of an answer. It is a pleading by defendant, and becomes necessary whenever from the nature of the case the defendant is entitled to affirmative relief. *Newton v. Gage*, 155 Fed. 608; *Weathersbee v. American Freehold Land Mortg. Co.* 77 Fed. 524; *North British & M. Ins. Co. v. Lathrop*, 17 C. C. A. 175, 25 U. S. App. 443, 70 Fed. 433; *Rickey Land & Cattle Co. v. Wood*, 81 C. C. A. 218, 152 Fed. 23; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Commercial Bank v. Sandford*, 103 Fed. 99; *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 768; *Gilmore v. Bort*, 134 Fed. 661. As we have seen, the only prayer of an answer is for dismissal of the bill, and from its very nature cannot support affirmative relief, as it can only be made a response to the charges in the bill. *Turner v. Southern Home Bldg. & L. Asso.* 41 C. C. A. 379, 101 Fed. 316; *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*), 10 Wall. 299, 19 L. ed. 894; *Wood v. Collins*, 8 C. C. A. 522, 23 U. S. App. 224, 60 Fed. 142. Therefore, if the defendant finds himself entitled to affirmative relief, he must file a bill as if instituting an original suit, which is called a cross bill. It is a counter bill against the plaintiff, or it may be against his codefendants, or both together; it touches matters involved in the original suit. *Newton v. Gage*, 155 Fed. 608; *Book v. Justice Min. Co.* 58 Fed. 831; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162; *Brande v. Gilchrist*, 18 Fed. 465; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720.

*Auxiliary Suit.*

A cross bill is not a new suit, but an auxiliary suit (Blythe v. Hinckley, 84 Fed. 235; United States v. Reese, 166 Fed. 347; Craig v. Dorr, 145 Fed. 307; Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; Thurston v. Big Stone Gap Improv. Co. 86 Fed. 485; Brooks v. Laurent, 39 C. C. A. 201, 98 Fed. 652); and it may be maintained though it could not have been filed as an original suit (Kirby v. American Soda Fountain Co. 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619; Brooks v. Laurent, 39 C. C. A. 201, 98 Fed. 652 and cases cited; Osborne & Co. v. Barge, 30 Fed. 805; First Nat. Bank v. Salem Capital Flour-Mills Co. 31 Fed. 580; Lilienthal v. McCormick, 54 C. C. A. 475, 117 Fed. 96); and may be filed without leave (Neal v. Foster, 34 Fed. 498). See "Filing Cross Bill."

*Subject-Matter Of.*

The original and cross bill is one cause, and the cross bill must be confined to the subject-matter of the original bill, and new and distinct matters, wholly disconnected with the original bill, cannot be introduced by a cross bill. Ibid.; Bunel v. O'Day, 125 Fed. 319; Gilmore v. Bort, 134 Fed. 658; Hogg v. Hoag, 107 Fed. 814; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co. 46 Fed. 852; Fidelity Trust & S. V. Co. v. Mobile Street R. Co. 53 Fed. 851; Ayres v. Chicago, 101 U. S. 187, 25 L. ed. 840; Cross v. DeValle, 1 Wall. 5, 17 L. ed. 515; **Sunset Teleph. & Teleg. Co. v. Eureka**, 122 Fed. 960; Thurston v. Big Stone Gap Improv. Co. 86 Fed. 484; Providence Rubber Co. v. Goodyear, 9 Wall. 809, 19 L. ed. 589. However, new matters and new issues having relevancy to the allegations and purpose of the original bill can be set up; that is, it must be germane. Kilburn v. Hirner, 163 Fed. 540; Springfield Co. v. Barnard Co. 81 Fed. 263, and cases cited; Goff v. Kelly, 74 Fed. 327; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; New Departure Bill Co. v. Hardware Specialty Co. 62 Fed. 463. See Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 86 Fed. 950, 951, and Bunel v. O'Day, 125 Fed. 304. But there

is another condition to be considered, and that is, though there be new matter connected with the subject-matter of the original suit, yet if the purpose of the cross bill be different from the original bill it cannot be maintained. *Cross v. DeValle*, 1 Wall. 5, 17 L. ed. 515; *Dickerman v. Northern Trust Co.* 25 C. C. A. 549, 53 U. S. App. 270, 80 Fed. 458.

The test seems to be: Do the matters of the cross bill grow out of, and does the relief prayed for depend on, the subject-matter of the original bill? *Ex parte South & North Ala. R. Co.* 95 U. S. 225, 24 L. ed. 356; *Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 83; *Gilmore v. Bort*, 134 Fed. 661.

### *Independent in Some Respects.*

While this is the character test of the cross bill, yet it has a feature of independence; in that citation must issue and be served, and proceedings had thereon, as in an original bill. *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*), 10 Wall. 302, 303, 19 L. ed. 895; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 711. (See *Service of Cross Bill*). And, like the original bill, it must be met by demurrer, plea, or answer. *Greenwalt v. Duncan*, 5 McCrary, 132, 16 Fed. 36; *Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129. And the sworn answer is evidence. *Penn Mut. L. Ins. Co. v. Union Trust Co.* 83 Fed. 894.

### *Uses of Cross Bill.*

The cross bill may be used under other conditions than what has heretofore been stated, that is,—

First. To obtain affirmative relief against the plaintiff.

Second. It may be used for discovery in aid of the answer. *Equity rule 72.*

Third. As a matter of defense to the bill to set up new matter, when it is too late to set it up by plea or answer, as after replication and issue joined.

Fourth. To settle conflicting claims between defendants which are necessary to be adjusted before a complete decree can be entered.

Fifth. When necessary to bring about a complete determination of all matters affected by the bill.

Sixth. It may sometimes be taken as an answer and vice versa.

I will briefly restate these several conditions, citing such authorities as will illustrate them.

*First, To Obtain Affirmative Relief.*

The cross bill, as before stated, is the only method by which the defendant can obtain affirmative relief in equity. Chapin v. Walker, 2 McCrary, 175, 6 Fed. 794; Ewing v. Seaboard Air Line R. Co. 175 Fed. 517; Mitchell v. International Tailoring Co. 169 Fed. 145; Under-Feed Stoker Co. v. American Stoker Co. 169 Fed. 892; Ames Realty Co. v. Big Indian Min. Co. 146 Fed. 169; Farmers' Loan & T. Co. v. Denver, L. & G. R. Co. 60 C. C. A. 588, 126 Fed. 46; Jackson v. Simmons, 39 C. C. A. 514, 98 Fed. 773, 774; Nelson v. Lowndes County, 35 C. C. A. 419, 93 Fed. 538; Hill v. Ryan Grocery Co. 23 C. C. A. 624, 41 U. S. App. 714, 78 Fed. 27, 28; Springfield Mill. Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; Interstate Bldg. & Loan Asso. v. Edgefield Hotel Co. 120 Fed. 423; White v. Bower, 48 Fed. 186; Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 293.

Mistake and fraud in the execution of the instrument sued on, whereby the true contract is not expressed, should be set up by cross bill. Commonwealth Title Ins. & T. Co. v. Cummings, 83 Fed. 767. See Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 289. It is the better practice. Big Creek Gap Coal & I. Co. v. American Loan & T. Co. 62 C. C. A. 351, 127 Fed. 627. You may set up by cross bill your title when sued to remove cloud from title. Greenwalt v. Duncan, 5 McCrary, 132, 16 Fed. 36. You may set up usurious interest, and ask for the penalty. Weathersbee v. American Freehold Land Mortg. Co. 77 Fed. 523. You may set up offsets by cross bill. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 615, 38 L. ed. 571, 14 Sup. Ct. Rep. 710; Central Appalachian Co. v. Buchanan, 33 C. C. A. 598, 62 U. S. App. 195, 90 Fed. 454. You may ask to reform and enforce an instrument which is sought to be canceled (Springfield Mill Co.



v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 263, 264; Meissner v. Buek, 28 Fed. 163), or *vice versa* (Commonwealth Title Ins. & T. Co. v. Cummings, 83 Fed. 767); but in Northern R. Co. v. Ogdensburg & L. C. R. Co. 18 Fed. 815, 816, the court held it was not necessary to file a cross bill to reform, as it could be set up by answer. See Northern R. Co. v. Ogdensburg & L. C. R. Co. 20 Fed. 347; Bradford v. Union Bank, 13 How. 69, 70, 14 L. ed. 54, 55. You may file cross bill to obtain delivery of property. Pullman Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808. You may by cross bill ask for a surrender of the agreement sought to be specifically performed. Meissner v. Buek, 28 Fed. 161; Springfield Mill Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 264. You may in every case where a contract lien is sought to be enforced seek by cross bill to cancel it, or *vice versa*. Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 289; Milwaukee & M. R. Co. v. Chamberlain, 6 Wall. 748, 18 L. ed. 859; La Daw v. E. Bement & Sons, 66 Fed. 198; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 288, 33 L. ed. 904, 10 Sup. Ct. Rep. 550.

Where one seeks as trustee for bondholders to foreclose the mortgage, the defendant cannot by cross bill recover damages for mismanagement of the trust. Fidelity Trust & S. V. Co. v. Mobile Street R. Co. 53 Fed. 852; Thurston v. Big Stone Gap Improv. Co. 86 Fed. 484, 485; Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co. 46 Fed. 853. But it seems the bondholders can set up by way of cross bill a diminution of the fund by bad management. Gasquet v. Fidelity Trust & S. V. Co. 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80; Hogg v. Hoag, 107 Fed. 807, approved in 83 C. C. A. 677, 154 Fed. 1003; see Bowling Green Trust Co. v. Virginia Pass & Power Co. 132 Fed. 925, s. c. 164 Fed. 753; Toler v. East Tennessee, V. & G. R. Co. 67 Fed. 172.

When a suit on an insurance policy is enjoined, you may recover the amount by way of cross bill. North British & M. Ins. Co. v. Lathrop, 63 Fed. 508. Prior mortgagee may by cross bill have his mortgage first foreclosed. First Nat. Bank v. Salem Capital Flour-Mills Co. 31 Fed. 583.

These citations sufficiently illustrate when cross bills may be

used for affirmative relief; but it has been held that when matter which is proper for cross bills has been set up by answer, and no objection taken, the court will treat the answer as a cross bill, and grant the relief if equitable. See "Sixth use" below for authorities. But not to obtain affirmative relief in a cause of action wholly disconnected with the original bill, or to settle matters not necessary to a complete decree. *Providence Rubber Co. v. Goodyear*, 9 Wall. 809, 19 L. ed. 589; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 852; *Armstrong v. Chemical Nat. Bank*, 37 Fed. 466; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 410; *Thruston v. Big Stone Gap Improv. Co.* 86 Fed. 484; *Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co.* 46 Fed. 851 (see Subject-matter).

Thus you cannot by a cross bill set up a creditors' bill when suit is upon an open contract. *Goff v. Kelly*, 74 Fed. 330-331. Nor by cross bill set up maladministration of a trust when trustee sues to foreclose a mortgage. So in action for infringement, you cannot file cross bill setting up infringement by plaintiff. *Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co.* 46 Fed. 852. See *Kilburn v. Hirner*, 163 Fed. 539. So setting up new controversy in suit to foreclose lien. *Industrial & Min. Guaranty Co. v. Electrical Supply Co.* 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. 742; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 410; *Goff v. Kelly*, 74 Fed. 330.

### *Second, As to Discovery.*

A cross bill for discovery is not now necessary, as you can require parties to testify, and, by motion supported by affidavit showing materialty, compel the plaintiff to produce books and papers. Equity rule 72; *Coit v. North Carolina Gold Amalgamating Co.* 9 Fed. 577; *Utah Constr. Co. v. Montana R. Co.* 145 Fed. 983; *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 141; see *Ore. Water, Light & Power Co. v. Oroville*, 162 Fed. 975; U. S. Rev. Stat. sect. 724; U. S. Comp. Stat. 1901, p. 583, does not apply to equity. *Providence Rubber Co. v. Goodyear*, 9 Wall. 809, 19 L. ed. 589; *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196. If, however, you do file a cross

bill for discovery in support of your answer, then equity rule 72 requires the answer to the original bill to be filed before plaintiff will be compelled to answer the cross bill, and when the answer to the cross bill is filed, it is evidence. If discovery is sought by a cross bill, it must be confined to matters contained in the cross bill, and not, as to matters set up in the original bill, and upon which it is based. *Ibid.*; *Sunset Teleph. & Teleg. Co. v. Eureka*, 122 Fed. 960.

*Third, As a Means of Defense.*

A cross bill is used as a means of defense sometimes, as well as for relief. *Neal v. Foster*, 34 Fed. 496; *Thurston v. Big Stone Gap Improv. Co.* 86 Fed. 484; *Jesup v. Illinois C. R. Co.* 43 Fed. 495; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 81 Fed. 261; *Newton v. Gage*, 155 Fed. 608; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 200, 34 L. ed. 635, 11 Sup. Ct. Rep. 61. And the defendant can set up in the cross bill matters purely legal, as well as equitable, if they be connected with the allegations of the original bill. *Ibid.*; *Weathersbee v. American Freehold Land Mortg. Co.* 77 Fed. 524; *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 288, 33 L. ed. 904, 10 Sup. Ct. Rep. 550; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Royal Union Mut. L. Ins. Co. v. Wynn*, 177 Fed. 293. Thus a discharge in bankruptcy should be set up by cross bill. So an agreement, or conveyance. *Carnochan v. Christie*, 11 Wheat. 446, 6 L. ed. 516.

It has been held that mistake or fraud, or that one is an innocent purchaser, or that a party is not the assignee of the note sued upon, when a defense to a bill, may be set up by cross bill. *Commonwealth Title Ins. & T. Co. v. Cummings*, 83 Fed. 767. So a counterclaim is only recognized by cross bill. *Brande v. Gilchrist*, 18 Fed. 465; *Springfield Mill Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *United States Trust Co. v. Western Contract Co.* 26 C. C. A. 472, 54 U. S. App. 67, 81 Fed. 468. However, in *Bausman v. Denny*, 73 Fed. 69, the court intimates it can be set up by answer, but no objection was made in the case to the answer. But a suit for accounting does not need a cross

bill; a balance in favor of defendant will be decreed without it. *Whittemore v. Patten*, 84 Fed. 57. A cross bill that sets up no defense but what could have been set up by answer will on motion be dismissed. *American & G. Mortg. & Invest. Corp. v. Marquam*, 62 Fed. 960; *Miller v. Rickey*, 146 Fed. 578; *Dickerman v. Northern Trust Co.* 25 C. C. A. 549, 53 U. S. App. 270, 80 Fed. 458; *Lautz v. Gordon*, 28 Fed. 265. However, matters which regularly should be included in a cross bill may be set up in answer, and if no objection is made, relief will be granted upon the answer. *United States v. Reese*, 166 Fed. 350; *Book v. Justice Min. Co.* 58 Fed. 831; *Coburn v. Cedar Valley Land & Cattle Co.* 138 U. S. 221, 34 L. ed. 886, 11 Sup. Ct. Rep. 258.

*Fourth, To Settle Matters Between Defendants.*

While a settlement between defendants may be effected by cross bill, yet it cannot be done unless the settlement is necessary to render a complete decree between all the parties. *Weaver v. Alter*, 3 Woods, 152; Fed. Cas. No. 17,308; *Rickey Land & Cattle Co. v. Wood*, 81 C. C. A. 218, 152 Fed. 23; *Craig v. Dorr*, 76 C. C. A. 559, 145 Fed. 310 and cases cited. *Veach v. Rice*, 131 U. S. 293, 33 L. ed. 163, 9 Sup. Ct. Rep. 730; *Corcoran v. Chesapeake & O. Canal Co.* 94 U. S. 744, 24 L. ed. 191; *Commercial Bank v. Sandford*, 103 Fed. 99; *Ames Realty Co. v. Big Indian Min. Co.* 146 Fed. 166. And should defendants thus attempt to raise issues independent of the bill, the cross bill will be dismissed. *Gilmore v. Bort*, 134 Fed. 658; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 410; *Vannerson v. Leverett*, 31 Fed. 377; see *Weaver v. Alter*, 3 Woods, 152, Fed. Cas. No. 17,307.

When a cross bill is necessary as between the defendants to settle a decree in the whole case, the question of their citizenship is not material (*Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 96; *Osborne & Co. v. Barge*, 30 Fed. 805; *First Nat. Bank v. Salem Capital Flour-Mills Co.* 31 Fed. 580; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 282; *Wabash R. Co. v. Adelbert College*, 208 U. S. 39, 52 L. ed. 379, 28 Sup. Ct. Rep. 182); nor the amount involved (*Kirby v. American Soda Fountain Co.* 194 U. S. 141, 48 L. ed. 911,

24 Sup. Ct. Rep. 619). However, this rule does not apply to conflicting interests of defendants being citizens of same State. Thus a nonresident suing for partition citizens of a State defendants by cross bill cannot litigate title as between themselves (*Beebe v. Louisville, N. O. & T. R. Co.* 39 Fed. 481; *Vannerson v. Leverett*, 31 Fed. 376; *Farmers' Loan & T. Co. v. San Diego Street-Car Co.* 40 Fed. 110; *Peacock, H. & W. Co. v. Thaggard*, 128 Fed. 1006; *Patton v. Marshall*, 26 L.R.A.(N.S.) 127, 97 C. C. A. 610, 173 Fed. 351), unless the property is in court (*Newton v. Gage*, 155 Fed. 598; *New Orleans v. Howard*, 87 C. C. A. 345, 160 Fed. 397; *United Electric Securities Co. v. Louisiana Electric Light Co.* 68 Fed. 673; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 282; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; *Park v. New York, L. E. & W. R. Co.* 70 Fed. 642, 643).

Fifth. When necessary to bring about a complete determination of all matters affected by the bill, a cross bill will lie. *Ibid.*; *Springfield Mill. Co. v. Barnard & L. Mfg. Co.* 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 462, 72 Fed. 410; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 852; *Ayres v. Carver*, 17 How. 591-595, 15 L. ed. 179-181; *Ex parte South & North Ala. R. Co.* 95 U. S. 221-225, 24 L. ed. 355-357; *Providence Rubber Co. v. Goodyear Co.* 9 Wall. 809, 19 L. ed. 589; *Rickey Land & Cattle Co. v. Wood*, 81 C. C. A. 218, 152 Fed. 23; *Gilmore v. Bort*, 134 Fed. 658; *Blythe v. Hinckley*, 84 Fed. 228.

Sixth. May sometimes be used as answer, and *vice versa*. *Hoge v. Eaton*, 135 Fed. 411; *Bradford v. Union Bank*, 13 How. 69, 70, 14 L. ed. 54, 55; *Lockwood v. Cleveland*, 6 Fed. 724; *Book v. Justice Min. Co.* 58 Fed. 831; *Moran v. Hagerman*, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 504.

### *Form of Cross Bill.*

The cross bill is drawn as an original bill. You will find in the old forms that it was necessary to set forth the original bill and proceedings in the cross bill, and this practice arose

because a cross bill could be filed in another court; but that is not now the rule, and you need only refer to that part of the bill or proceedings to which the matter of the cross bill is set up as a defense; that is, so much as shows the application and materiality of the cross bill. If affirmative relief is asked, the cross bill must be drawn with the same care as the original bill, and the case must present an appeal to equitable cognizance. *United States v. Reese*, 166 Fed. 347; Not necessary to contain jurisdictional averments as to citizenship. *Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co.* 139 Fed. 840.

The answer and cross bill must be separate pleadings, though under one cover. *United Cigarette Mach. Co. v. Wright*, 132 Fed. 196.

### *Parties.*

Only parties to the original bill can be made parties to a cross bill. *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 90. You cannot use the cross bill to introduce new parties. *Bunel v. O'Day*, 125 Fed. 319; *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162; *United States Gypsum Co. v. Hoxie*, 172 Fed. 505; *Newton v. Gage*, 155 Fed. 610; *Thruston v. Big Stone Gap Improv. Co.* 86 Fed. 484; *Patton v. Marshall*, 26 L.R.A.(N.S.) 127, 97 C. C. A. 610, 173 Fed. 350; *Central Trust Co. v. Cincinnati, H. & D. R. Co.* 169 Fed. 466; *Adelbert College v. Toledo, W. & W. R. Co.* 47 Fed. 846. See *Lavis v. Consumers' Brewing Co.* 106 Fed. 435; *Ulman v. Jaeger*, 155 Fed. 1011-1016. Holding new parties may be brought in by cross bill which seeks affirmative relief, and they are necessary to the granting of the relief, citing *McComb v. Chicago, St. L. & N. O. R. Co.* 19 Blatchf. 69, 7 Fed. 426, and *Mercantile Trust Co. v. Atlantic & P. R. Co.* 70 Fed. 518, declaring the rule as stated above is only applicable to cross bills seeking discovery, and not affirmative relief, and that the rule is changed since *Shields v. Barrow*, 17 How. 145, 15 L. ed. 162. The ordinary rule of the Federal courts is that new parties are necessary, you must bring them in by suggesting a want of parties in the answer, as already explained. *Thruston v. Big Stone Gap Improv. Co.* 86 Fed. 485; *Shields v. Barrow*, 17 How.

145, 15 L. ed. 162; *United States Gypsum Co. v. Hoxie*, 172 Fed. 505. A stranger cannot ordinarily file a cross bill by way of intervention. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 170-173; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 838. But when permitted to intervene, he may file a cross bill. *Brinckerhoff v. Holland Trust Co.* 159 Fed. 191, 192.

### *Filing Cross Bill.*

In *Bronson v. LaCrosse & M. R. Co.* 2 Wall. 283, 17 L. ed. 725, it was held irregular to file a cross bill without leave of the court, but this is not a fixed rule. As said, it is in effect a defense and a regular proceeding in a suit in equity. *Neal v. Foster*, 34 Fed. 498. Of course, after the issues have been closed, or after evidence taken, or out of its proper order in pleading, it is sought to file a cross bill, then permission should be asked. Thus in *Huff v. Bidwell*, 81 C. C. A. 43, 151 Fed. 566; *Under-Feed Stoker Co. v. American Stoker Co.* 169 Fed. 892; and *Neal v. Foster*, 34 Fed. 499, the defendant sought to file a cross bill after publication of the testimony; it was held that it only could have been filed then by leave of court; but the courts have been liberal in practice, and will permit the filing at any time before decree if the ends of justice demand it. Filing cross bill alleging new facts and asking relief waives jurisdictional questions over subject-matter. *Original Consol. Min. Co. v. Abbott*, 167 Fed. 682 and cases cited.

### *No Delay in Filing.*

There should be as little delay as possible in filing a cross bill, yet the whole matter is in the court's discretion. *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.* 109 U. S. 172, 27 L. ed. 897, 3 Sup. Ct. Rep. 108. A cross bill may be filed after answer filed, when the complainant is seeking to discontinue, and the object of the cross bill is to settle the rights in litigation. *Pullman's Palace-Car Co. v. Central Transp. Co.* 49 Fed. 261; see *Neal v. Foster*, 34 Fed. 496.

### *Process for Parties.*

There must always be a prayer for process, and the appear-

ance of parties to a cross bill must be enforced by process regularly served. *Blythe v. Hinckley*, 84 Fed. 239; *Washington, A. & G. R. Co. v. Bradley* (*Washington, A. & G. R. Co. v. Washington*), 10 Wall. 299, 19 L. ed. 895; *Johnston v. Fraser* (*Tex. Civ. App.*), 92 S. W. 49; *Wood v. Collins*, 8 C. C. A. 522, 23 U. S. App. 224, 60 Fed. 142; *Boyce v. Concho Cattle Co.* (*Tex. Civ. App.*), 70 S. W. 356; *Meyer v. Kuhn*, 13 C. C. A. 298, 25 U. S. App. 174, 65 Fed. 711. A petition by way of cross bill that makes nobody a defendant and asks no process is a nullity. *American & G. Mortg. & Invest. Corp. v. Marquam*, 62 Fed. 960; *Wright v. St. Louis South Western R. Co.* 175 Fed. 846.

### *Service of Cross Bill.*

The cross bill must be served, and the same rule applies in the Texas practice when the plaintiff does not appear to prosecute. *Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172. Complainant answering waives service. *Byers v. Sugg* (*Tenn.*) 57 S. W. 397. Otherwise the filing is notice, and judgment by default may be taken. *Smithers v. Smith*, 35 Tex. Civ. App. 508, 80 S. W. 646. While the cross bill is served as an original bill, yet you can apply for and obtain an order for substituted service on the attorney of the plaintiff, when the complainant is beyond the jurisdiction of the court and the cross bill is only an *auxiliary* bill. *Gregory v. Pike*, 29 Fed. 590; *Rio Grande Dam & Irrig. Co. v. United States*, 215 U. S. 277, 54 L. ed. 194, 30 Sup. Ct. Rep. 97; *Dunlevy v. Dunlevy*, 38 Fed. 459; *Providence Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. ed. 829; *Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 43 Fed. 332; *Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80.

However, the rule for substituted service is denied to cross bills setting up facts not alleged in the original bill, and which new facts are made the ground of affirmative relief. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 852.

If plaintiff be a foreign corporation, you may get an order of service on the attorney, if it has no agent or other representative in the jurisdiction but the attorney. *Johnson Railroad Signal Co. v. Union Switch & Signal Co.* 43 Fed. 331.



In *Troendle v. Van Nortwick*, 39 C. C. A. 286, 98 Fed. 787, it appears that the cross bill did not pray for process, nor was it issued and served, but the objecting party, it seems, appeared and participated in the proceedings upon the hearing of the original and cross bill. It was held objections came too late on appeal. When substituted service has been improvidently made, it may be set aside. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 850.

### *Amendment of Cross Bill.*

The rules admitting amendments to original bills apply to cross bills, for all the rules governing the proceedings by which an issue is reached, from the original bill to the replication, govern cross bills. If amendment of the cross bill is permitted, it must be filed under the rules. *Ferguson Contracting Co. v. Manhattan Trust Co.* 55 C. C. A. 529, 118 Fed. 793. An application to amend after replication must be filed under equity rule 29. *Beavers v. Richardson*, 118 Fed. 320.

### *Extent of Amendment.*

In *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 288, 33 L. ed. 904, 10 Sup. Ct. Rep. 550, it is held that a cross bill may be amended so as to work a change in the ground of relief sought, where the proofs which make it necessary are furnished by the original complainant in support of the allegations of his bill.

### *Hearing on Cross Bill.*

If the cross bill is set for hearing, so is the original bill, and *vice versa*; both must be considered together. *Meissner v. Buek*, 28 Fed. 163; *Ex parte South & North Ala. R. Co.* 95 U. S. 221, 24 L. ed. 355.

### *Decree on Cross Bill.*

From the nature of the cross bill a decree thereon would not be final if the original bill is not disposed of. *Ex parte South*  
S. Eq.—31.

& North Ala. R. Co. 95 U. S. 225, 24 L. ed. 356; Ayres v. Carver, 17 How. 595, 15 L. ed. 180. But a final decree can be entered on a cross bill when the rights of the parties assume such shape that they can be settled on the lines of the averment of the cross bill. Blythe v. Hinckley, 84 Fed. 228-235; Markell v. Kasson, 31 Fed. 104; Jesup v. Illinois C. R. Co. 43 Fed. 483; Springfield Mill. Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 264; Troendle v. Van Nortwick, 39 C. C. A. 286, 98 Fed. 786; Heinze v. Butte & B. Consol. Min. Co. 61 C. C. A. 63, 126 Fed. 6, and cases cited. So a decree pro confesso can be entered on a cross bill. Blythe v. Hinckley, 84 Fed. 288, see Badger Gold Min. & Mill Co. v. Stockton Gold & Copper Min. Co. 139 Fed. 840.

*Effect of Dismissing Original Bill on Cross Bill.*

If the cross bill is only for discovery, or as a defense, or setting up matters in aid of the defense, or so purely auxiliary that the cross bill is useless if the original bill is dismissed, then the cross bill falls with the original bill. Small v. Peters, 104 Fed. 403; Jesup v. Illinois C. R. Co. 43 Fed. 495; Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co. 6 Wall. 747, 18 L. ed. 859; Dows v. Chicago, 11 Wall. 112, 20 L. ed. 67; Industrial & Min. Guaranty Co. v. Electrical Supply Co. 7 C. C. A. 471, 16 U. S. App. 196, 58 Fed. 742. So when cross bill is between citizens of same State, Cabaniss v. Reco Min. Co. 54 C. C. A. 190, 116 Fed. 319; but when the cross bill seeks affirmative relief, or alleges additional facts, which would settle the matters in litigation in the event the defendant prevailed, it would not fall with the original bill. Jackson v. Simmons, 39 C. C. A. 514, 98 Fed. 768; Craig v. Dorr, 76 C. C. A. 559, 145 Fed. 310; Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Co. 139 Fed. 838-840; Markell v. Kasson, 31 Fed. 104; Jesup v. Illinois C. R. Co. 43 Fed. 495; Small v. Peters, 104 Fed. 401; Heinze v. Butte & B. Consol. Min. Co. 61 C. C. A. 63, 126 Fed. 6; San Diego Flume Co. v. Souther, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164; Sanders v. Riverside, 55 C. C. A. 240, 118 Fed. 722; Holgate v. Eaton, 116 U. S. 42, 29 L. ed. 540, 6 Sup. Ct. Rep. 224. Being in its nature an original bill, it is not subject to the control of com-

plainant. *Jackson v. Simmons*, 39 C. C. A. 514, 98 Fed. 773. As, where a cross bill is filed for enforcing a judgment (*Milwaukee & M. R. Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859); or when it sets up a counterclaim (*Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 427); or when brought to settle the matters in litigation where complainant is seeking to dismiss his bill (*Pullman's Palace Car Co. v. Central Transp. Co.* 49 Fed. 261). Dismissal of an intervening petition does not necessarily dismiss a cross bill. *Sunflower Oil Co. v. Wilson*, 142 U. S. 325, 35 L. ed. 1029, 12 Sup. Ct. Rep. 235.

*Cross Bill By and Against Corporations.*

Cross bills may be filed against as well as by a corporation (*Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196), and when filed for discovery, it cannot refuse to answer because its officers may be examined as witnesses. *Ibid.*; *Continental Nat. Bank v. Heilman*, 66 Fed. 184. *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 301.

## CHAPTER LXXX.

### INTERVENTION.

#### *What is.*

Intervention is the application of a person not a party to the suit to litigate some claim of title or interest, by way of lien or otherwise, in the property which is the subject-matter of the suit, or which has been drawn into the possession of the court during the progress of the cause.

#### *Two Kinds.*

There are two kinds of intervention recognized by the courts, *viz.*: One in which the right to intervene is wholly discretionary with the court, and from which no appeal lies, should intervention be refused. *Ex parte Cutting*, 94 U. S. 22, 24 L. ed. 51; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824, and cases cited; *Re Metropolitan R. Receivership (Re Reisenberg)* 208 U. S. 111, 52 L. ed. 413, 28 Sup. Ct. Rep. 219; *Land Title & T. Co. v. Tatnall*, 65 C. C. A. 671, 132 Fed. 305; *Land Title & T. Co. v. Asphalt Co.* 62 C. C. A. 23, 127 Fed. 2; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *Central Trust Co. v. Cincinnati, H. & D. R. Co.* 169 Fed. 470; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 863. The other is where the right to intervene is absolute, and a refusal to permit intervention can be appealed from. *Ibid.*; *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739; *Brinckerhoff v. Holland Trust Co.* 146 Fed. 203; *Tift v. Southern R. Co.* 159 Fed. 558, 559; *Credits Commutation Co. v. United States*, 34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 853.

It is difficult sometimes to distinguish between these two

species of intervention and to determine to which class it belongs. It was said in the *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 825, that where a refusal to intervene is sustained, that the proper practice would be to grant an appeal, and permit the appellate court to determine whether in the particular case the right of intervention was of the class that falls within the court's discretion.

While no rule can be laid down where discretion controls, yet out of the cases may be evolved certain tests to determine to which class of intervention the particular case belongs. The mere fact that a party asserts some interest in the controversy or in the property does not bind the court to permit the intervention (*Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739), even though the property be in the hands of a receiver (*Ibid.*). If the interest asserted would not be affected by the proceedings, or where it appears that the right asserted is entirely subordinate to the rights of the parties to the suit, or that the interest of one seeking intervention is already represented in the case, or that he has other adequate remedies to protect his interest without burdening the principal suit with his collateral issues, then the right of intervention lies wholly within the court's discretion, *Ibid.*; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed. 30, and cases cited; *United States v. Philips*, 46 C. C. A. 660, 107 Fed. 824; *Credits Commutation Co. v. United States*, 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; *Jones v. Sands*, 25 C. C. A. 233, 51 U. S. App. 153, 79 Fed. 913; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed 219; *Sands v. E. S. Greeley & Co.* 80 Fed. 195.

But when the petition for intervention shows that in the pending suit the right of the party seeking intervention is in jeopardy, that is, an inability to obtain relief by other means, as when the party seeking intervention has a lien or title to the subject-matter in the hands of the court, or a present right to possession superior to the rights asserted in the main suit; or when the refusal would be a practical denial of relief, as where in the pending suit the fund may be dissipated out of which he must look for relief, these and kindred conditions make the right to intervention absolute, and a refusal may be appealed from as a right. *Credits Commutation Co. v. United States*,

34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; *United States v. Philips*; 46 C. C. A. 660, 107 Fed. 824, and authorities above cited; *Credits Commutation Co. v. United States*, 177 U. S. 315, 316, 44 L. ed. 785, 786, 20 Sup. Ct. Rep. 636.

### *Procedure.*

You must file a petition asking permission of the court to file a bill of intervention in all cases where the right to intervene is within the sound discretion of the court. *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 392; *Perry v. Godbe*, 82 Fed. 143; *Born v. Schneider*, 128 Fed. 179. The form of the proceeding is determined by the circumstances of the case. *Krippendorf v. Hyde*, 110 U. S. 286, 28 L. ed. 149, 4 Sup. Ct. Rep. 27. And it must not only appear that a petition was filed, but that it was granted. *Ibid.*; *Washington, G. & A. R. Co. v. Bradley*, 7 Wall. 575, 19 L. ed. 274; *Perry v. Godbe*, 82 Fed. 143. See *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 46 U. S. App. 268, 76 Fed. 254.

### *Form of Application.*

Title as in bill, thus: A. B. vs. C. D.; F. W., Intervener.

To the Honorable Judges of the Circuit Court of the United States for the  
.....District of.....:

The petition of F. W., a citizen of and residing in.....county in the State of....., humbly complaining of A. B., plaintiff, and C. D., defendant, in the above cause, would show unto your honors that A. B., plaintiff, did on the.....day of....., A. D. 19..., file his bill in this cause wherein he (here set forth substance of bill and prayer); that on the.....day of....., A. D. 19..., the defendant C. D. filed his answer (or such proceedings as were taken, setting forth only the substance); that petitioner claims an interest, etc. (here set forth interest, showing how it arose and the necessity for intervention and a right to participate in the decree).

Then pray for permission to file the intervention and the relief desired by your intervention.

This petition should be accompanied with your pleading you seek to file in the event you are let in, and the court must see from the pleading—

First. That there will be no delay to the plaintiff in prosecuting his suit.

Second. That the pleading is reasonably sufficient to effect the purpose intended, and,—

Third. As before stated, that it is a proper case for intervention. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 174, 175.

### *Contesting Application.*

Any of the parties to the suit may contest the application, and they have a right to have all the grounds upon which the application is based to be specifically set forth. See *Powell v. Leicester Mills*, 92 Fed. 115, 116. While the petition in intervention may not be as formal as a bill, yet it should exhibit all the material facts relied upon, and embody by recital or reference as much of the record of the original suit as is essential; also proceedings taken in the main suit after filing the petition, which would strengthen the right of petitioner, may be incorporated by amendment. *Empire Distilling Co. v. McNulta*, 23 C. C. A. 415, 46 U. S. App. 578, 77 Fed. 701.

### *Order When Application Granted.*

Title as in bill; W. F., intervener.

This cause coming on to be heard on the application of W. F., intervener in this suit, to be made a party (plaintiff or defendant), and the petition having been duly considered, and it appearing to the court that the said W. F., petitioner (here state the basis of the application that the court has found true).

It is therefore ordered, adjudged, and decreed that W. F., petitioner, has leave to intervene in said suit and to that end may appear in said suit within.....days from the date of this order, in the same manner and with like effect as if named in the original bill as a party (plaintiff or defendant).

This order to be without prejudice to any proceedings heretofore had in this cause.

Judge, etc.

### *Effect of Order.*

The effect of the order is to make the applicant a party to the suit in all subsequent proceedings, and gives the right of

appeal. *Rice v. Durham Water Co.* 91 Fed. 433. *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 8.

But intervention cannot affect jurisdiction once obtained (*Clarke v. Eureka County Bank*, 116 Fed. 534), though asserted by cross bills against other defendants from same State. (*Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 89). Nor can an intervener attack jurisdiction. *Morton Trust Co. v. New York & O. R. Co.* 105 Fed. 539; *Rice v. Durham Water Co.* 91 Fed. 434; *Sioux City Terminal R. & Warehouse Co. v. Trust Co.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 128.

### *Waiving Order of Intervention.*

While leave to intervene should be by order, yet parties to the suit failing to object to it on that account waive it. So, filing a replication to an intervening bill waives order of intervention. *Perry v. Godbe*, 82 Fed. 141; *Illinois Steel Co. v. Ramsey*, 100 C. C. A. 323, 176 Fed. 864, and cases cited; *People's Sav. Inst. v. Miles*, 22 C. C. A. 152, 40 U. S. App. 341, 76 Fed. 254; *Gest v. Packwood*, 39 Fed. 536; *French v. Gapen*, 105 U. S. 525, 26 L. ed. 956.

### *Notice of Intervention.*

Notice is not necessary, the filing of the application is sufficient; however, in *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 325; *McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 378, it is held that to give notice is the better practice, though there is no rule requiring it. *Ibid.*; *Central Trust Co. v. Madden*, 17 C. C. A. 236, 25 U. S. App. 430, 70 Fed. 453.

### *Making Defendant by Intervention.*

The general rule is that a stranger cannot make himself a defendant in a suit in equity, and courts of equity have adhered to this rule as a basis in determining whether the application to intervene should be granted. *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326; *Smith v. Gale*, 144 U. S. 519, 36 L. ed. 525, 12 Sup. Ct. Rep. 674; *Chester v. Life Asso.* 4 Fed. 488--



491. In *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 170, the court says: "That a stranger to a suit will not be permitted on his own application to be made a party defendant in an equity suit over the objections of plaintiff is a well established general rule to which there are few exceptions" (and the reasons are fairly stated in *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 845; *Chester v. Life Asso. of America*, 4 Fed. 491), unless, of course he is an indispensable party. *Carter v. New Orleans*, 19 Fed. 659; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160. In such case a court will require the plaintiff to amend his bill on penalty of dismissal for want of parties essential to determining the case. See *Chester v. Life Asso. of America*, 4 Fed. 491, for further exceptions to the rule.

The equities of the case must show strongly the necessity of admitting a stranger to the suit as defendant on his own application, and the petition to intervene as defendant must be accompanied by the proposed answer upon the face of which the necessity appears. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 168. The court should exercise extreme caution (*Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326), and it should appear that the interest of the party seeking to be made a party to the suit is of a direct and immediate character that is a claim to or lien upon the property involved (*Carter v. New Orleans*, 19 Fed. 659; *Smith v. Gale*, 144 U. S. 518, 36 L. ed. 524, 12 Sup. Ct. Rep. 674; *Clarke v. Eureka County Bank*, 116 Fed. 537, and cases cited); and even then it rests in the sound discretion of the chancellor (*Hamlin v. Toledo St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 665; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed. 30; *Newton v. Gage*, 155 Fed. 598). A general averment of interest is bad; it must state facts showing interest. *Clarke v. Eureka County Bank*, 116 Fed. 536, 537.

The reason of this caution on the part of the courts is based upon the theory that the plaintiff should not be compelled to enter into litigation with parties not of his own seeking; if so, what he sets out to do by a simple suit may, against his will, become complicated, expensive and interminable. *Gregory v.*

Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 845; *Chester v. Life Asso. of America*, 4 Fed. 491, 492. If plaintiff has failed to make the necessary parties, the remedies are pointed out in the rules heretofore explained. *Ibid.* While *Galveston H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199, and *Ex parte South & North Ala. R. Co.* 95 U. S. 221, 24 L. ed. 355, seem to militate against this rule, yet in these cases the admission of the parties upon their application was not contested.

I have thus considered the rule applicable to one who is a stranger to the suit seeking to be made a party against the will of the plaintiff. The rule would not apply where,—

First. The application is made by one who was named in the suit, but not served with process, but subsequently comes within the jurisdiction.

Second. When the application is made by one of a class represented in the bill, and for whose benefit or against whom the suit is brought. *Chester v. Life Asso. of America*, 4 Fed. 491; *Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co.* 53 Fed. 850; *Forest Oil Co. v. Crawford*, 42 C. C. A. 54, 101 Fed. 851; *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326.

Third. When the party applying represents a party to the bill whose interest has been transmitted by death or operation of law. *Ex parte South & North Ala. R. Co.* 95 U. S. 226, 24 L. ed. 357; *Chester v. Life Asso. of America*, 4 Fed. 491.

In the second and third exceptions it will be seen that the persons allowed to become parties are not altogether strangers, but in effect are quasi parties. *Lombard Invest. Co. v. Seaboard Mfg. Co.* 74 Fed. 326; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 850; *Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 83.

Under the second, where the suit is by some of a class for the benefit of all similarly situated, and a common trustee is defendant, or where a suit is by a common trustee and relates to the mortgage or trust deed, a beneficiary will not be allowed to come in, unless his interests are in jeopardy by reason of collusion or incompetency or fraud of the trustee. *Toler v. East Tennessee, V. & G. R. Co.* 67 Fed. 172. See *Williams v. Morgan*, 111 U. S. 696, 697, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; *Richter v. Jerome*, 123 U. S. 246, 31 L. ed. 137, 8 Sup.

Ct. Rep. 106; Fletcher v. Ann Arbor R. Co. 53 C. C. A. 647, 116 Fed. 481; Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co. 53 Fed. 182; Carter v. New Orleans, 19 Fed. 659; Farmers' Loan & T. Co. v. Cape Fear & Y. Valley R. Co. 71 Fed. 39.

*Pro Suo Interesse.*

What has heretofore been said refers to one who seeks to be made a party on his own application to contest the issues in the principal case, and whereby, as we have seen, he becomes as fully a party to the original suit as if named in the original bill. This question of making defendants or parties by intervention, as stated in Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 846, is entirely different from that of an intervention *pro suo interesse*, permitted in Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Perry v. Godbe, 82 Fed. 143; Phelps v. Oaks, 117 U. S. 241, 29 L. ed. 890, 6 Sup. Ct. Rep. 714; Raisin v. Statham, 22 Fed. 146, and in cases hereafter to be cited. In this latter case the applicant does not become a party to the main controversy, nor can such applicant change the main issues by his intervention. *Ibid.* Thus when the court has jurisdiction of the *res*, or where a fund is to be distributed, and the party has to prove his claim against the *res*, or found, or where one beneficiary desires to contest the claim of another to the fund, then intervention lies.

The possession of the court draws the right to intervene by parties having a claim. Rouse v. Letcher, 156 U. S. 50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 504, 505; Central Trust Co. v. Carter, 24 C. C. A. 73, 41 U. S. App. 663, 78 Fed. 233; Myers v. Luzerne County, 124 Fed. 437; Merritt v. American Steel-Barge Co. 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 231; Rice v. Durham Water Co. 91 Fed. 433. So a fund to be distributed entitles all parties claiming an interest to intervene and show it, and this is true, though the jurisdiction of the court would forbid the filing of an original bill. *Ibid.*; Toler v. East Tennessee, V. & G. R. Co. 67

Fed. 172; Central Trust Co. v. Carter, 24 C. C. A. 73, 41 U. S. App. 663, 78 Fed. 233; National Bank v. Allen, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 555.

These rules are illustrated by the familiar cases of receiverships, where a party, without reference to citizenship or amount, may intervene. Electrical Supply Co. v. Put-in-Bay Waterworks, Light & R. Co. 84 Fed. 740; Fish v. Ogdensburgh & L. C. R. Co. 79 Fed. 131; Lamb v. Ewing, 4 C. C. A. 320, 12 U. S. App. 11, 54 Fed. 273; Farmers' Loan & T. Co. v. Houston & T. C. R. Co. 44 Fed. 116; Carey v. Houston & T. C. R. Co. 52 Fed. 674.

So in creditors' bills, the practice of permitting judgment creditors to make themselves parties *without leave* of court is well settled. Myers v. Fenn, 5 Wall. 207, 18 L. ed. 606; Richmond v. Irons, 121 U. S. 43-47, 30 L. ed. 869-871, 7 Sup. Ct. Rep. 788; National Bank v. Allen, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545-555; Hubb v. Bidwell, 81 C. C. A. 43, 151 Fed. 564.

The power of a court of equity to permit such interventions rests independent of statute. Rice v. Durham Water Co. 91 Fed. 433, 434; Gregory v. Van Ee, 160 U. S. 646, 40 L. ed. 567, 16 Sup. Ct. Rep. 431. It is necessarily inherent, or its process would be abused to the injury of others. Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279.

### *When Intervention Will Not Lie.*

In Rouse v. Hornsby, 14 C. C. A. 377, 32 U. S. App. 111, 67 Fed. 220, it was held that when the petition for intervention shows a legal demand, such as damages for personal injury, plaintiff is entitled to a jury to assess; that is, you must establish your claim at law before you can file an intervention.

Again, a claim cannot be the subject-matter of intervention in one ancillary jurisdiction, when the party lives and the claim arose in another ancillary jurisdiction. Clyde v. Richmond & D. R. Co. 65 Fed. 338, 339; Sands v. E. S. Greeley & Co. 80 Fed. 196; Central Trust Co. v. United States Flour Mill Co. 112 Fed. 371; Farmers' Loan & T. Co. v. Northern P. R. Co. 72 Fed. 26.

To illustrate: A receiver is appointed in Texas of a railroad

running through other States, in which other States ancillary receiverships have been appointed by the Federal courts, say Arkansas and Missouri, then a claim originating in Arkansas cannot be the subject matter of intervention in Missouri.

An equitable right cannot be the subject-matter of intervention in a suit at law. *Gravenberg v. Laws*, 40 C. C. A. 240, 100 Fed. 5, 6; *Clarke v. Eureka County Bank*, 116 Fed. 534. The equitable right must be enforced by a bill in equity, which would be ancillary to the lawsuit, and the question of parties as affecting diversity of citizenship would not affect jurisdiction. Neither would the amount or value of the interest. *Gravenberg v. Laws*, *supra*; *Clarke v. Eureka County Bank*, 116 Fed. 534; *Krippendorf v. Hyde*, 110 U. S. 287, 28 L. ed. 149, 4 Sup. Ct. Rep. 27.

Nor will intervention lie after decree, unless to protect an interest which cannot otherwise be protected. *United States v. Northern Securities Co.* 128 Fed. 808.

### *Form of Intervention When Res in Court's Possession.*

Having stated the right of intervention when the *res* is in possession of the court, I will now suggest a form to be used.

Title as in bill (in which receiver appointed or the *res* or fund was put into the hands of the court) adding as before W. F., intervener.

Your petitioner, W. F., a citizen of and residing in the county of..... in the State of....., praying for leave to intervene in the above cause, respectfully represents that on the.....day of....., A. D. 19..., and prior to the order of this court appointing John Smith receiver of the (railroad, estate, or fund), and placing the property of the said (railroad, estate, or fund) in his hands as such receiver, all of which matters are now pending in this honorable court, your petitioner obtained a judgment in the.....court of.....county, in the State of....., against the said (railroad, estate, or fund) (here describe judgment or claim, giving court date, amount, etc., and attach certified copy; or, if judgment has been recovered against the receiver so state; in a word, accurately state your claim, whatever it may be, and such evidence of it as will satisfy the court).

That said judgment (or claim) declares and establishes the said sum of .....dollars as a proper charge (or said claim is a proper charge, etc.) and lien on the earnings of said railroad (or the property of said estate or the fund, etc.), and petitioner prays an order of this honorable court to permit him to intervene and upon hearing to have the lien fixed and the

judgment paid in the due order of the administration of the trust and for such further order as to the court may seem equitable.

R. F.,  
Solicitor.

Attach, as stated, your judgment, certified to from the court where obtained, or your claim properly verified. You may also attach to the petition a motion to refer to the special master usually appointed in these cases, unless there be a general order in the case, as is usual, to refer all intervening petitions to the special master, in which case the clerk will refer the case.

If a motion is necessary, then file as follows:

Title as in bill; W. F., Intervener.

Now comes W. F., intervener, by counsel, and moves the court to refer his petition for intervention in all things to E. M., Esq., special master in chancery, for his examination and report, and intervener will ever pray, etc.

R. F.,  
Solicitor, etc.

*Citizenship and Amount as Affecting Jurisdiction of Federal Courts in Intervention, Pro Suo Interesse.*

The rule of jurisdiction in Federal courts depending on citizenship and amount, or value of the subject-matter, do not apply to interventions, or other auxiliary suits. Citizenship is not material, and Federal courts having jurisdiction of the original suit; and *having in possession* the property or fund in which the intervener has an interest will permit an intervention *pro suo interesse* without reference to the citizenship of the parties, and this intervention will be permitted by motion, petition, or by ancillary bill in equity; and in whatever way you seek the intervention you may use substantially the form given. *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279.

The diverse citizenship of the original parties, if that be the ground of jurisdiction, is sufficient to support subsequent interventions. *Newton v. Gage*, 155 Fed. 604, and cases cited; *Clarke v. Eureka County Bank*, 116 Fed. 534; *Society of Shakers v. Watson*, 68 Fed. 730; *Krippendorf v. Hyde*, 110

U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Lilienthal v. McCormick, 54 C. C. A. 475, 117 Fed. 96; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642; Osborne v. Barge, 30 Fed. 805; Park v. New York, L. E. & W. R. Co. 70 Fed. 641; Rouse v. Letcher, 156 U. S. 50, 39 L. ed. 342, 15 Sup. Ct. Rep. 266; Henderson v. Goode, 49 Fed. 887; Farmers' Loan & T. Co. v. Houston & T. C. R. Co. 44 Fed. 115. But diverse citizenship of original parties will not support an intervention of a third party who is a citizen of the same State with defendant, unless the controversy between complainant and defendant is one which *draws to the court's possession* the defendant's property in which intervener claims an interest. United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673; Seligman v. Santa Rosa, 81 Fed. 524. See Forest Oil Co. v. Crawford, 42 C. C. A. 54, 101 Fed. 849. So citizens of a State having property attached and thus drawn into the Federal court may intervene *pro suo interesse* for its protection. Compton v. Jesup, 68 Fed. 280, and authorities cited; Gumbel v. Pitkin, 124 U. S. 132, 31 L. ed. 374, 8 Sup. Ct. Rep. 379.

*Nor is Amount Important.*

When the Federal court has jurisdiction, and the control of the fund or property, it can entertain jurisdiction of an intervention without reference to the amount or value of intervener's claim. People's sav. Inst. v. Miles, 22 C. C. A. 152, 40 U. S. App. 341, 76 Fed. 252; National Bank v. Allen, 33 C. C. A. 169, 61 U. S. App. 102, 90 Fed. 545.

*Amendment of.*

Bill of intervention may be amended. Anthony v. Campbell, 50 C. C. A. 195, 112 Fed. 212-217.

## CHAPTER LXXXI.

### INTERLOCUTORY PROCEEDINGS.

#### *Interlocutory Orders.*

I will not conclude the discussion of the successive steps in a suit in equity, which matures the case for taking evidence, by a brief general view of interlocutory orders. It is necessary, as we have seen at various stages of its progress, to take orders in furtherance of its preparation for final hearing, or for the preservation and protection of property in litigation, or rights therein, as heretofore shown. All such orders are called interlocutory orders, and are limited as to time, on their faces sometimes, or by law, as in case of injunctions (equity rule 55; U. S. Rev. Stat. sec. 719, U. S. Comp. Stat. 1901, p. 581), or they may continue in force until the final hearing.

As said, they may be granted at any time during the progress of the cause, either in term time or vacation, on rule days or such time as the court may appoint for hearing, when not grantable of course. All interlocutory decrees remain under the direction of the court, to be set aside by proper application at any time (Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co. 10 C. C. A. 20, 22 U. S. App. 359, 61 Fed. 708; Blythe v. Hinckley, 84 Fed. 228), and no appeal lies therefrom. (Ibid.; Perkins v. Fourniquet, 6 How. 209, 12 L. ed. 407; see "Appeals"). They are granted on petition or motion, and may be on *ex parte* applications, as in cases of imminent danger to property, but the general rule is to serve notice of the application for them by motion or otherwise.

When a motion for any character of interlocutory order is made, it should set out every material fact necessary to relief, and especially is this so when a preliminary order is sought that is necessary to protect some right or the property in litigation. Motions of the latter class must be supported by affidavits, and



when the application is *ex parte*, the necessity of such character of application must be shown in the affidavits.

Again, if interlocutory relief in such cases is necessary at the time of filing the bill, the facts to support it ought to be set up in the bill, and the bill be sworn to and supported by affidavits, and the prayer; whether the application be by motion or contained in the bill, it must specifically pray for the relief required and must conform to the case made.

### *Injunctions.*

Writs of injunction pending a suit in equity may issue whenever cause exists, by the court or a judge thereof. We have already seen by equity rule 23 that an injunction may be asked for pending the suit, and in case of absolute necessity may issue before the bill is filed. *Universal Sav. & T. Co. v. Stoneburner*, 51 C. C. A. 208, 113 Fed. 254. *Horn v. Pere Marquette R. Co.* 151 Fed. 634. New Code, chap. 11, secs. 263, 264, 265.

### *By Whom Granted.*

By any justice of the Supreme Court or circuit or district judges of the United States (U. S. Rev. Stat. sec. 719), but under the following conditions: New Code section 264.

A justice of the Supreme Court cannot hear an application in any cause pending in the circuit court elsewhere than within the limits of the judicial circuit to which he is allotted, or at such place outside of the circuit as the parties may stipulate in writing, except when it cannot be heard by the circuit or district judge of the district in which the suit is pending.

A district judge cannot hear the application in any case where a party has had a reasonable time to apply to the circuit court, and when issued by the district judge, it can continue no longer than to the term of the circuit court next ensuing, unless otherwise ordered by the circuit court. U. S. Rev. Stat. sec. 719; equity rule 55, 5 Bann. & Ard. 590; *Goodyear Dental Vulcanite Co. v. Folsom*, 3 Fed. 509.

See secs. 264, 265, and 266 of New Code. These sections change the old law in cases restraining the enforcement of a State law on the ground of constitutionality. Three judges

must hear and determine it, one of whom must be a justice of the Supreme Court or a circuit judge.

### *On Notice.*

U. S. Rev. Stat. sec. 718, U. S. Comp. Stat. 1901, p. 580, provides that whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision on the motion, and such order may be granted, with or without security in the discretion of the court or judge. By equity rule 55, if injunction is asked in bill to stay proceedings at law, and defendant does not appear and plead, plaintiff will be entitled on motion without notice to the writ; but that special injunctions shall be grantable only on due notice to the other party by the court in term, or a judge in vacation after a hearing, which may be *ex parte*, if adverse party does not appear at the time and place ordered.

See sec. 263, New Code, embodying the old law.

### *Time May Be Issued.*

Where a bill in chancery is filed with the court, it has jurisdiction to issue an injunction though the bill was not lodged in the clerk's office and no subpoena issued until two days after. *Universal Sav. & T. Co. v. Stoneburner*, 51 C. C. A. 208, 113 Fed. 251. Temporary injunctions may be issued when danger of irreparable injury is apparent, upon application. The court must exercise a sound judicial discretion in granting or refusing. *Stearns-Roger Mfg. Co. v. Brown*, 52 C. C. A. 559, 114 Fed. 940, 942; U. S. Rev. Stat. sec. 718. New Code, sec. 263-266.

### *Enjoining Proceedings in State Courts.*

By U. S. Rev. Stat. sec. 720, U. S. Comp. Stat. 1901, p. 581, it is provided that an injunction shall not be granted to "stay proceedings" in a State court except in bankruptcy cases. This statute limits the powers of the circuit court in furtherance of a harmonious administration of justice in the two

jurisdictions. *Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 475, 476; *Evans v. Gorman*, 115 Fed. 401; *Security Trust Co. v. Union Trust Co.* 134 Fed. 301. In bankruptcy the Federal courts may enjoin taking away property from the trustee. *Re Gutman*, 114 Fed. 1009; *New River Coal & Land Co. v. Ruffner Bros.* 165 Fed. 881-882; *Re Blue Stone Bros.* 174 Fed. 54. However, we will see further that the limitation does not apply to an injunction issued by the Federal courts in defense of its jurisdiction of a cause of action, when the *res* is in possession of the court. *Ibid.* U. S. Rev. Stat. art. 720, embodied in sec. 265 of the New Code.

### *What Are "Proceedings."*

Proceedings cover not only the successive steps in the suit up to the entry of judgment, but all process necessary to the full execution of the judgment. *Mills v. Provident Life & T. Co.* 100 Fed. 346, 347; *Phelps v. Mutual Reserve Fund Life Asso.* 112 Fed. 463, 464; *Leathe v. Thomas*, 38 C. C. A. 75, 97 Fed. 136; *American Asso. v. Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 1; *Provident Life & T. Co. v. Mills*, 91 Fed. 435; *Security Trust Co. v. Union Trust Co.* 134 Fed. 301.

Section 720 originated in 1793, and is a legislative command that the courts of these two jurisdictions must move within their respective limits, and exercise their respective powers without conflict. The courts have adhered with remarkable consistency to the letter and spirit of the law. It may be, as often declared, that the act was but the declaration of that comity between courts of concurrent jurisdiction, which has always been recognized, but there is no doubt that its mandatory form has been a wholesome restriction upon the Federal courts. It has emphasized the duty to give preference to those methods of procedure which served to conciliate the distinct and independent tribunals of the two systems. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 464, 465; *Evans v. Gorman*, 115 Fed. 401, 402; *Taylor v. Carryl*, 20 How. 597, 15 L. ed. 1032.

### *When Section 720 Does Not Apply.*

It is settled, however, that section 720 does not apply when

the court is seeking to maintain its own jurisdiction over the subject-matter, the possession of which has been first obtained by the court. It is a settled rule of comity that the possession of the *res* vests the court first acquiring the same with the power to hear and determine all controversies relating thereto, and disables the other courts of concurrent jurisdiction from interfering therewith. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 465; *Garner v. Second Nat. Bank*, 16 C. C. A. 86, 33 U. S. App. 91, 67 Fed. 833; *Julian v. Central Trust Co.* 193 U. S. 93, 48 L. ed. 629, 24 Sup. Ct. Rep. 399; *Foster v. Lebanon Springs R. Co.* 100 Fed. 543; *Rodgers v. Pitt*, 96 Fed. 671; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Knott v. Evening Post Co.* 124 Fed. 352; *McDowell v. McCormick*, 57 C. C. A. 401, 121 Fed. 65; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Southern R. Co. v. Simon*, 153 Fed. 234; *Massie v. Buck*, 62 C. C. A. 535, 128 Fed. 27; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782; *Mercantile Trust & D. Co. v. Roanoke & S. R. Co.* 109 Fed. 3; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Central Trust Co. v. Western North Carolina R. Co.* 89 Fed. 24; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Starr v. Chicago, R. I. & P. R. Co.* 110 Fed. 6, 7. And the rule is not restricted in its application to property actually seized, but appears as well when suits are brought to *enforce liens*, to marshal assets, administer trusts, or liquidate insolvent estates, or whenever the suit is of such a character that the court may in its progress be compelled to assume possession of the property to be affected. *Ibid.*; *Merritt v. American Steel Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 231; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 680; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Marks v. Marks*, 75 Fed. 333; *Shields v. Coleman*, 157 U. S. 178, 39 L. ed. 663, 15 Sup. Ct. Rep. 570; *Owens v. Ohio C. R. Co.* 20 Fed. 12, 13; *Appleton Waterworks Co. v. Central Trust Co.* 35 C. C. A. 302, 93 Fed. 289. Nor is it restricted to protecting its own *prior ju*

risdiction, but the Federal court may enjoin when necessary to protect its decree. *Central Trust Co. v. Western North Carolina R. Co.* 112 Fed. 471-477; *Stewart v. Wisconsin C. R. Co.* 117 Fed. 782.

Nor does this section affect the right of the Federal court to restrain a judgment of a State court obtained by fraud. *Phelps v. Mutual Reserve Fund Life Asso.* 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 465 and cases cited; *Wood v. Davis*, 108 Fed. 130; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 807, and cases cited; *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. ed. 630, 9 Sup. Ct. Rep. 237; *Marshall v. Holmes*, 141 U. S. 590, 35 L. ed. 871, 12 Sup. Ct. Rep. 62; *Bailey v. Willeford*, 126 Fed. 806, 807; *United States v. Beebe*, 34 C. C. A. 321, 92 Fed. 244; *United States v. Throckmorton*, 98 U. S. 68, 25 L. ed. 96. See "Bill of Revivor for Fraud." Nor when a judgment is obtained in a State court by collusion, conspiracy, or false swearing. *Ritchie v. Sayers*, 100 Fed. 533; *Braxton v. Rich*, 47 Fed. 178; *Perry v. Johnston*, 95 Fed. 325; *Moor v. Moor* (Tex. Civ. App.), 63 S. W. 350; *Holton v. Davis*, 47 C. C. A. 246, 108 Fed. 150, 151. Nor when the judgment has been obtained without service (*Cooper v. Newell*, 173 U. S. 556, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; *Hekking v. Pfaff*, 43 L.R.A. 618, 33 C. C. A. 328, 50 U. S. App. 484, 91 Fed. 60), or jurisdiction (*Phœnix Bridge Co. v. Castleberry*, 65 C. C. A. 481, 131 Fed. 177, 178); or when it is otherwise void (*Harrison v. Lokey*, 26 Tex. Civ. App. 404, 63 S. W. 1030); and State courts may thus attack Federal judgments. *Ralston v. Sharon*, 51 Fed. 707; *League v. Scott*, 25 Tex. Civ. App. 318, 61 S. W. 521. See *Central Nat. Bank v. Stevens*, 169 U. S. 463, 42 L. ed. 818, 18 Sup. Ct. Rep. 403.

### *When Jurisdiction Attaches.*

While the rule that the court obtaining possession of the subject-matter prior in point of time cannot be interfered with, yet the issue as to when the jurisdiction attached has often arisen. *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Merritt v. American Steel Barge Co.* 79 Fed. 231, 24 C. C. A. 530, 49 U. S. App. 85. In testing this, the Federal courts have held that jurisdiction does not attach

except on the service of process, and the rule is not controlled by State statutes. *United States v. Eisenbeis*, 50 C. C. A. 179, 112 Fed. 196.

In *Owens v. Ohio C. R. Co.* 20 Fed. 10, it is said that the jurisdiction of the court attaches on the service of process. *Rodgers v. Pitt*, 96 Fed. 673; *Union Mut. L. Ins. Co. v. University of Chicago*, 10 Biss. 191, 6 Fed. 443; *Hughes v. Green*, 28 C. C. A. 537, 56 U. S. App. 56, 84 Fed. 833; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Colston v. Southern Home Bldg. & L. Asso.* 99 Fed. 309. In *Rodgers v. Pitt*, 96 Fed. 673, it is said that jurisdiction of a cause does not attach, within the meaning of the general rule, by filing the complaint and issuance of summons, but attaches only on the service of process, and the court whose process is first served holds the cause. *Ibid.* and cases cited; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 679; *Shields v. Coleman*, 157 U. S. 177, 178, 39 L. ed. 663, 664, 15 Sup. Ct. Rep. 570; *United States v. American Lumber Co.* 80 Fed. 315.

There is no question that process which first seizes and holds property and brings it within the dominion of the court gives to that court exclusive jurisdiction. *Vowinckel v. N. Clark & Sons*, 62 Fed. 992, 993; *Robinson v. Mutual Reserve L. Ins. Co.* 162 Fed. 794; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Royal Trust Co. v. Washburn, B. & I. R. Co.* 71 C. C. A. 579, 139 Fed. 865; *Cooper v. Reynolds*, 10 Wall. 317, 19 L. ed. 932; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53<sup>4</sup> Fed. 967; *Southern Bank & T. Co. v. Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 931; *Kelly, M. & Co. v. Sioux Nat. Bank*, 81 Fed. 4. But in suits for foreclosure of liens, or when the suit is substantially *in rem*, and by the allegations of the bill the dominion over the subject-matter is contemplated, and necessary to a proper decree, then a suit in equity is begun by filing the bill. *Louisville Trust Co. v. Knott*, 65 C. C. A. 158, 130 Fed. 825; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Mound City Co. v. Castleman*, 177 Fed. 510; *Merritt v. American Steel Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 231; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294-301, 28 L. ed. 729-731, 5 Sup. Ct. Rep. 135; *Harding v. Corn*

Products Ref. Co. 94 C. C. A. 144, 168 Fed. 659; Appleton Waterworks Co. v. Central Trust Co. 35 C. C. A. 302, 93 Fed. 286-288. See Humane Bit Co. v. Barnet, 117 Fed. 318, holding a suit in equity is begun by filing bill, following Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 61, 44 L. ed. 671, 20 Sup. Ct. Rep. 564, but as between the parties in a proceeding *in rem*, when process issued. The Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. *supra* was a foreclosure of a mortgage in the Federal court the defendant filed a bill in the State court and sought to enjoin proceedings in the Federal court. The bill had been first filed in the Federal court, but process from the State court had been first served. The court says filing the bill in the Federal court gave jurisdiction to this court first, and it was not controlled by the service of process. *Ibid.* The filing of the bill and the *bona fide* issue of process is sufficient. Equity rule 11. The court says the rule as stated is of special importance in its application to Federal and State courts; and, in applying the doctrine of *lis pendens* to the case of a third person who is a bona fide purchaser, notice is held to begin from date of service of process, and not from filing the bill.

### *Ne Exeat.*

In equity rule 23, stating what the prayer for process shall contain, it is provided that if a writ *ne exeat regno* pending the suit is asked in the prayer for relief, it can be granted if justified by the allegations of the bill.

A form for the writ will be found in *Griswold v. Hazard*, 141 U. S. 263, 35 L. ed. 681, 11 Sup. Ct. Rep. 972, 999, and it will be seen that it is designed to prevent a defendant against whom an indebtedness is alleged from going beyond the jurisdiction of the court in which the suit is pending, and to secure which sufficient bail or security is required of the defendant, or to be imprisoned in case of refusal to give it.

A party arrested upon *ne exeat* may obtain a discharge of the writ upon motion or petition, upon defendant's giving security to answer the bill and to render himself amenable to process during the pendency of the suit, and to such process as may be issued to compel a performance of the decree. *Griswold v. Hazard*, 141 U. S. 281, 35 L. ed. 687, 11 Sup. Ct. Rep. 972, 999.

The writ is in force, when issued, until the judgment is satisfied, or property security given, or is some way discharged by the court (Lewis v. Shainwald, 48 Fed. 500; McNamara v. Dwyer, 7 Paige, 239, 32 Am. Dec. 631), and it seems that the writ may, after judgment, be issued upon motion or petition, though there was no prayer in the bill asking it. Ibid.; 14 Am. Dec. 561, note; Lewis v. Shainwald, 48 Fed. 500; U S. Rev. Stat. sec. 717, U. S. Comp. Stat. 1901, p. 580.

It is not of itself a remedy, but a means to effectuate a remedy, *viz.*, by keeping a party within the jurisdiction of the court. Shainwald v. Lewis, 69 Fed. 496, 497; Re Cohen, 136 Fed. 999; Gooding v. Reid, M. & Co. 101 C. C. A. 310, 177 Fed. 684. The old law is embodied in sec. 261 of the New Code.



## CHAPTER LXXXII.

### AUXILIARY SUITS.

All cross bills, interventions, bills of revivor, supplemental bills, and bills for injunctive relief pending a suit are auxiliary bills in equity. The object and effect of filing these bills have been already discussed, and I now propose only to speak of auxiliary bills generally.

All bills growing out of or connected with a pending suit are called auxiliary or ancillary suits in equity. *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 652; *McDonald v. Seligman*, 81 Fed. 753; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *Hobbs Mfg. Co. v. Gooding*, 164 Fed. 93; *Cooper v. Newton*, 160 Fed. 190; *Brown v. Allebach*, 156 Fed. 697; *O'Connor v. O'Connor*, 146 Fed. 994; *King v. Buskirk*, 24 C. C. A. 82, 42 U. S. App. 249, 78 Fed. 233-235. The jurisdiction of the main suit supports the auxiliary bill. *Ross v. Ft. Wayne*, 11 C. C. A. 288, 24 U. S. App. 113, 63 Fed. 471; *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 660; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 642; *Compton v. Jessup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263; *Everette v. Independent School Dist.* 102 Fed. 530; *Carey v. Houston & T. C. R. Co.* 161 U. S. 133, 40 L. ed. 644, 16 Sup. Ct. Rep. 537. But such bill must, both in a proper and legal sense, be an ancillary bill; it must, in fact, be only a continuation of the original suit, that is, it must relate to some matter already litigated by the same parties or their representatives. If the bill contains matter not before litigated by the same parties standing in the same interests, that is, if new parties are brought in, and new matter charged as a basis of relief, then the bill is not an ancillary, but original bill, and cannot be supported by the former suit, but must stand independently on its parties and subject-matter for jurisdiction in the Federal courts. *Union Cent. L. Ins. Co. v. Phil-*

lips, 41 C. C. A. 263, 102 Fed. 19; Anglo-Florida Phosphate Co. v. McKibben, 13 C. C. A. 36, 23 U. S. App. 675, 65 Fed. 529; Raphael v. Trask, 118 Fed. 777; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Shinney v. North American Sav. Loan & Bldg. Co. 97 Fed. 9.

### *Illustrations.*

We have the most frequent illustrations of these ancillary bills, which are brought to restrain or regulate judgments recovered in law or equity. Leigh v. Kewanee Mfg. Co. 127 Fed. 990; South Penn Oil Co. v. Calf Creek Oil & Gas Co. 140 Fed. 508; Broadis v. Broadis, 86 Fed. 951; Freeman v. Howe, 24 How. 460, 16 L. ed. 752; Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498, 4 Sup. Ct. Rep. 583; Krippendorf v. Hyde, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; Virginia-Carolina Chemical Co. v. Home Ins. Co. 51 C. C. A. 21, 113 Fed. 3; Bradshaw v. Miners' Bank, 26 C. C. A. 673, 53 U. S. App. 399, 81 Fed. 902. So bills to revive a judgment. Wanderly v. Lafayette County, 77 Fed. 665. Or set aside a decree. Carey v. Houston & T. C. R. Co. 161 U. S. 128, 40 L. ed. 643, 16 Sup. Ct. Rep. 537; Symmes v. Union Trust Co. 60 Fed. 853. Or to modify or correct it. Thompson v. Schenectady Co. 124 Fed. 274. Or to obtain the enforcement or construction of a former decree. Jenks v. Brewster, 96 Fed. 625. So all bills filed by receivers to protect property or remove cloud. Connor v. Alligator Lumber Co. 98 Fed. 155; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Compton v. Jesup, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 279-280; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 578, 43 L. ed. 817, 19 Sup. Ct. Rep. 500; Brookfield v. Hecker, 118 Fed. 942; Bausman v. Denny, 73 Fed. 69. Or suits brought against the receivers touching the property in their possession. Shinney v. North American Sav. Loan & Bldg. Co. 97 Fed. 9; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Washington v. Northern P. R. Co. 75 Fed. 333; Sullivan v. Barnard, 81 Fed. 886; Carpenter v. Northern P. R. Co. 75 Fed. 850; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 82 Fed. 642. Or in any case, as heretofore shown, where

the court takes possession of property or a fund for distribution, and wherein all bills filed by those claiming an interest are auxiliary; and the jurisdiction is not affected because the question involved may be of a legal nature. *Cunningham v. Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *St. Louis & K. C. R. Co. v. Continental Trust Co.* 36 C. C. A. 195, note; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 82 Fed. 643; *Osborn & Co. v. Barge*, 30 Fed. 805; see *Whalen v. Enterprise Transp. Co.* 164 Fed. 96; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018. So in matters of injunctive relief that becomes necessary during the pendency of a cause in equity or law; bills filed in aid of such suits to preserve property, or the status of parties and subject-matter, are auxiliary. *South Penn Oil Co. v. Calf Creek Oil & Gas Co.* 140 Fed. 508; *Hill v. Kuhlman*, 31 C. C. A. 87, 59 U. S. App. 82, 87 Fed. 498; *Virginia-Carolina Chemical Co. v. Home Ins. Co.* 51 C. C. A. 21, 113 Fed. 3; *Freeman v. Howe*, 24 How. 460, 16 L. ed. 752; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750; *Jones v. Andrews*, 10 Wall. 333, 19 L. ed. 937; *West v. East Coast R. Co.* 51 C. C. A. 426, 113 Fed. 742.

I cannot possibly cover by illustration the field when and where these auxiliary bills are appropriate, so I will conclude by calling attention to the distinguishing features of these bills from original bills in Federal courts.

First. As to the citizenship of the parties, and other matters affecting the jurisdiction of Federal courts.

Second. As to the service of process when auxiliary bills are filed.

First. These bills can be filed and maintained in the Federal courts, though the court would not have jurisdiction of them as original bills (*Rice v. Durham Water Co.* 91 Fed. 433; *American Surety Co. v. Lawrenceville Cement Co.* 96 Fed. 25; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 652 and cases cited; *Milwaukee & M. R. Co. v. Chamberlain*, 6 Wall. 748, 18 L. ed. 859; *Osborn & Co. v. Barge*, 30 Fed. 805; *First Nat. Bank v. Salem Capital Flour-Mills Co.* 31 Fed. 580; *Lilienthal v. McCormick*, 54 C. C. A. 475, 117 Fed. 96), because neither diverse citizenship, residence, or amount, nor value of subject-matter, as required under the general judiciary act, are neces-

sary to appear to support the jurisdiction (Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. 36 C. C. A. 155, 95 Fed. 497; Central Trust Co. v. Bridges, 6 C. C. A. 539, 16 U. S. App. 115, 57 Fed. 753; Park v. New York, L. E. & W. R. Co. 70 Fed. 643; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 201, 34 L. ed. 635, 11 Sup. Ct. Rep. 61; Lilienthal v. McCormick, 54 C. C. A. 75, 117 Fed. 96; Ames Realty Co. v. Big Indian Min. Co. 146 Fed. 179; Newton v. Gage, 155 Fed. 604; Ulman v. Jaeger, 155 Fed. 1011; Craig v. Dorr, 76 C. C. A. 559, 145 Fed. 311; Aldrich v. Campbell, 38 C. C. A. 347, 97 Fed. 663; Myers v. Hettinger, 37 C. C. A. 369, 94 Fed. 370; Widaman v. Hubbard, 88 Fed. 812; Re Tyler, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785).

### *Substituted Service.*

Second. As to service of process in auxiliary bills, equity rule 13 requires that the service of all subpoenas shall be by delivering a copy to the defendant personally, or leaving a copy at the dwelling house or usual place of abode; but notwithstanding this rule and equity rules 14, 15, and 16, it is now well settled that in all classes of proceedings of an auxiliary character the service of process may be made by what is called *substituted service*.

Every departure from the rule governing service of process as provided in equity rule 13, and by which other methods are provided for obtaining jurisdiction over parties, is substituted service. *Boswell v. Otis*, 9 How. 350, 13 L. ed. 170. Thus, service on the agent or attorneys of the parties to the suit, in lieu of the service on the parties themselves, when permitted, is substituted service. *Ibid.* There must be an *order* for this service. *Pacific R. Co. v. Missouri P. R. Co.* 1 McCrary, 647, 3 Fed. 772; *Gregory v. Pike*, 25 C. C. A. 48, 50 U. S. App. 4, 36 C. C. A. 299, 94 Fed. 373, 79 Fed. 520. So the service authorized by section 8 of the act of 1875, providing for special process to be sent beyond the limits of the State, or by publication, is a form of substituted service. *Forsyth v. Pierson*, 9 Fed. 801.

### *On Agents.*

Service on agents or attorneys of parties is not known to

equity on original bills, but applies to auxiliary bills, as in cross bills (*Gregory v. Pike*, 29 Fed. 588; *Dunn v. Clarke*, 8 Pet. 3, 8 L. ed. 846), or suit against a State (*Port Royal & A. R. Co. v. South Carolina*, 60 Fed. 552); or interventions, and such bills as are in fact continuations of the original suit (*Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851).

The relief sought must be germane to the suit, and not under new facts not in the original bill, in order to support substituted service (*Ibid.*), as ancillary bills of an original nature must be served as original bills (*Gregory v. Pike*, 25 C. C. A. 48, 47 U. S. App. 4, 79 Fed. 521, and cases cited; *Smith v. Woolfolk*, 115 U. S. 143, 29 L. ed. 357, 5 Sup. Ct. Rep. 1177; *Manning v. Berdan*, 132 Fed. 382; *Bowen v. Christian*, 16 Fed. 729; *Providence Rubber Co. v. Goodyear*, 9 Wall. 810, 19 L. ed. 589; *Shainwald v. Davids*, 69 Fed. 702). The cross bill must have some legal or equitable merit to support such service. *Muhlenburgh County v. Citizens' Nat. Bank*, 65 Fed. 539. Its use has been permitted in injunctions to restrain or in aid of actions at law; and in all these instances the attorney representing the defendant in the bill, who had conducted the action at law, is a recognized agent upon whom the service can be made. *Abraham v. North German F. Ins. Co.* 3 L.R.A. 188, 37 Fed. 731; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 227; *Bartlett v. Sultan of Turkey*, 19 Fed. 346; *Paine v. Warren*, 33 Fed. 358.

To illustrate: An action at law is brought on a policy of insurance, but it is discovered that a reformation is necessary, for which you must file a bill in equity; in such case you may serve the attorney of the defendant in the common-law suit by delivering the subpoena to him. 37 Fed. 731, *supra*.

Persons belonging to a class represented in a suit, who are regarded as *quasi* parties, may have service on the attorney of nonresident parties, if they should file a petition in a suit to protect themselves. *Fidelity Trust & S. V. Co. v. Mobile Street Co.* 53 Fed. 851; *Gasquet v. Fidelity Trust & S. V. Co.* 6 C. C. A. 253, 13 U. S. App. 564, 57 Fed. 80. Substituted service is sometimes allowed on a party who has absconded to avoid service, or who conceals himself, but has a legal and acknowledged

representative or general agent in the jurisdiction of the court. *Shainwald v. Davids*, 69 Fed. 702.

*Character of Attorney on Whom Service Made.*

If the attorney is not a general agent of the party to be served, then the service is not good (*Shainwald v. Davids*, *supra*; *Bowen v. Christian*, 16 Fed. 730; *Cortes Co. v. Thannhauser*, 20 Blatchf. 59, 9 Fed. 228; *Brown v. Arnold*, 127 Fed. 390; *Pike v. Gregory*, 36 C. C. A. 299, 94 Fed. 374; *Smith v. Woolfolk*, 115 U. S. 143-150, 29 L. ed. 357-360, 5 Sup. Ct. Rep. 1177); and the bill must not contain such new facts or prayer for relief as would destroy the presumption that the attorney on whom the service was made was authorized to represent the respondent in the cross bill. *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851. *Bowen v. Christian*, 16 Fed. 729.

*How Substituted Service Obtained.*

This character of service can only be made on application to the court and upon an order by the court granting leave to serve the attorney or agent; if not based on an order of court, it is void. *Pacific R. Co. v. Missouri P. R. Co.* 1 McCrary, 647, 3 Fed. 772; *Pike v. Gregory*, 36 C. C. A. 299, 94 Fed. 373, 374, S. C. 25 C. C. A. 48, 50 U. S. App. 4, 79 Fed. 520; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 851; *Gage v. Riverside Trust Co.* 156 Fed. 1002. The order to make the service is granted on motion filed for that purpose, and the motion must be based on some legal or equitable merit, as shown in your auxiliary bill (*Muhlenburg County v. Citizens' Nat. Bank*, 65 Fed. 537), and the circumstances rendering such service necessary must be clearly stated (*Ibid.*; *Shainwald v. Davids*, 69 Fed. 702, 703; *Oglesby v. Attrill*, 14 Fed. 214).

The application for substituted service may be stated in the bill or by motion setting up the facts upon which substituted service will be granted, and whether in the bill, or otherwise, should be as follows:

Complainant shows that the said C. D., defendant, is a resident of New

Orleans and citizen of the State of . . . . ., and is not an inhabitant and citizen of the . . . . . district of . . . . ., where this suit is brought, and cannot be found therein so as to be served with process and summons to appear as defendant in this suit; and complainant shows that the said C. D. has an attorney appearing for him in this suit and sundry other suits brought by the said C. D. concerning the matter in controversy, some of which are still pending, namely, Charles Smith, Esq., of this city.

Wherefore the complainant A. B. prays that this court may order that notice of this suit and a summons to appear therein may be served on said Charles Smith, Esq., and that such notice being thus duly served may be held to be notice of this suit duly served on the defendant C. D.

The form as above given is only the general frame work of the application. If the substituted service is sought of a cross bill, or in an injunction proceeding, or in any auxiliary suit, or in whatever proceeding, your bill or your motion must show that it is a proceeding in which substituted service is permitted, and that the circumstances exist which render such service necessary. Constructive service on nonresidents has already been discussed and forms given.

### *Motion to Vacate.*

If there is any ground upon which a motion to vacate the substituted service can be made, you should file it at once, and you may use the following form:

Title as in bill.

And now comes C. D., defendant in this cause, and not admitting the jurisdiction of the court in or over the above entitled cause, and for the purpose of objecting to the exercise of this court of any such jurisdiction, comes and moves the court that the writ of subpoena issued out of the clerk's office of said court on the . . . . . day of . . . . ., A. D. 19 . . . ., which has not been served on him as the law requires, may be quashed and that said cause may be dismissed by the court for want of jurisdiction of the same.

By Charles Smith, his solicitor, who appears specially for the purpose of raising the question of jurisdiction, and that alone.

Charles Smith,  
Solicitor for C. D.

Pike v. Gregory, 36 C. C. A. 299, 94 Fed. 374.

Be careful in this motion that you do not put in issue any other fact than that which asserts jurisdiction, or you waive the service.

*Interpleader.*

A bill of interpleader is filed by one who has the possession, but no interest in the subject-matter of the suit. It seeks the instruction of the court as to whom the fund or property in possession should be delivered as between contesting litigants. *Bolin v. St. Louis Southwestern R. Co.* —Tex. Civ. App.—61 S. W. 444. In *Groves v. Sentell*, 153 U. S. 485, 38 L. ed. 785, 14 Sup. Ct. Rep. 898, it is said: The general rule is that a party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, strictly so called; in fact, perfect disinterestedness is an essential ingredient of such bill, citing *Killian v. Ebbinghaus*, 110 U. S. 568-572, 28 L. ed. 246-248, 4 Sup. Ct. Rep. 232, which declares that a bill of interpleader must aver that petitioner has no interest in the subject-matter of the suit, must admit title in claimants, and aver indifference between them, and cannot seek relief against either. *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 841; *Pusey & J. Co. v. Miller*, 61 Fed. 401; *Penn Mut. L. Ins. Co. v. Union Trust Co.* 83 Fed. 891; see *Provident Sav. Life Assur. Soc. v. Loeb*, 115 Fed. 359; and *McNamara v. Provident Sav. Life Assur. Soc.* 52 C. C. A. 530, 114 Fed. 912-914; *Stevens v. Germania L. Ins. Co.* 26 Tex. Civ. App. 153, 62 S. W. 826; *Jackson & S. Co. v. Pearson*, 60 Fed. 123.

*Bill in Nature of Interpleader.*

There has been recognized in *Groves v. Sentell*, 153 U. S. 485, 38 L. ed. 792, 14 Sup. Ct. Rep. 898, and many other cases, a bill in the nature of a bill of interpleader when complainant sets up, as between the conflicting interests of parties to the suit, an interest for which equitable relief is sought. *Ibid.*; *McNamara v. Provident Sav. Life Assur. Soc.* 52 C. C. A. 530, 114 Fed. 912; *Lackett v. Rumbaugh*, 45 Fed. 32 and cases cited; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 844, 845. But when a complainant in a bill of interpleader has acquired an interest from two adverse claimants, his bill of interpleader cannot be sustained. *Standley v. Roberts*, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 840-842.



## CHAPTER LXXXIII.

### EVIDENCE IN EQUITY SUITS.

The replication having been filed, which puts the cause at issue, the evidence must now be taken in support of the issues. There are several methods by which this may be done, *viz.*: You may, by consent after the cause is at issue, refer the case to the standing master, or a special master, or an examiner to take the evidence orally, or by deposition, or both, and require the master to report back the evidence thus taken to the court; or to report it back with his findings thereon; or you may, under a rule lately promulgated by the Supreme Court, upon due notice and application to the court, take the evidence orally before the court on final hearing. This reference to the master to take the evidence may be ordered by the court on motion of either party, or by the court *sua sponte*.

If not referred to a master or examiner, or the court has not granted the order to take the evidence orally, then you must take your evidence by depositions in the way provided by statute, and the equity rules promulgated by the Supreme Court.

#### *Statutes and Rules Controlling the Taking of Evidence in Equity Suits.*

U. S. Rev. Stat. sec. 862, U. S. Comp. Stat. 1901, p. 661, provides that the mode of proof in causes in equity shall be according to the rules now or hereafter provided by the Supreme Court. U. S. Rev. Stat. sec. 917, U. S. Comp. Stat. 1901, p. 684, provides that the Supreme Court shall have power to prescribe from time to time, and in a manner not in conflict with any law of the United States, the mode and manner of taking evidence and obtaining discovery in suits in equity. Under this power the Supreme Court has promulgated its rules providing for the manner of taking testimony in equity causes.

By equity rule 67 it is provided, that *after* the cause is at

issue, a commission to take the testimony may be taken out, in vacation as well as in term time, jointly or severally, upon interrogatories filed in the clerk's office by parties taking out the same. (See "Examination by Commission on Interrogatories.") It requires ten days' notice to be given to the adverse party to file cross interrogatories, before issuing the commission, and if no cross interrogatories are filed, they may be issued *ex parte*. By the second paragraph of equity rule 67, either party may give notice that he desires the evidence to be taken orally, and thereupon all of the witnesses to be examined shall be examined before an examiner to be specially appointed by the court. (See "Oral Examination.")

By equity rule 68, testimony after issue joined may be taken according to the acts of Congress; referring to U. S. Rev. Stat. secs. 863 to 875, U. S. Comp. Stat. 1901, pp. 661 to 667. Section 863 providing for depositions *de bene esse*; section 866 for depositions *in perpetuam rei memoriam*, and under a *dedimus potestatem*; section 871 for depositions in the District of Columbia; section 875 taking testimony by letters rogatory.

By equity rule 70 it is provided for taking depositions in equity *de bene esse* before answer filed. On March 9, 1892, Congress passed the following act (27 Stat. at L. p. 7, chap. 14): That in addition to the mode of taking depositions in causes in the circuit and district courts of the United States, it shall be lawful to take depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held. 27 Stat. at L. p. 7, chap. 14; *Shellabarger v. Oliver*, 64 Fed. 306; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *International Tooth-Crown Co. v. Honk's Dental Asso.* 101 Fed. 306; *Ex parte Fisk*, 113 U. S. 723, 28 L. ed. 1121, 5 Sup. Ct. Rep. 724; *Batts' (Tex.) Rev. Stat.* 2273 to 2298. This act was only cumulative. *United States v. Fifty Boxes*, 92 Fed. 601; *Carrara Paint Agency Co. v. Carrara Paint Co.* 137 Fed. 319; *Smith v. International Mercantile Co.* 154 Fed. 786; *National Cash-Register Co. v. Leland*, 77 Fed. 242; *McLennan v. Kansas City, St. J. & C. B. R. Co.* 22 Fed. 198.

On the 15th of May, 1893, the Supreme Court of the United States promulgated the following rule as an amendment to equity rule 67: "Upon due notice the court may at its discre-

tion permit the whole of the testimony, or any specific portion of the testimony in an equity suit, to be adduced orally on final hearing in open court." 149 U. S. Appx. p. 793, 37 L. ed. 1235.

Thus, having grouped the rules and statutes authorizing the taking of evidence in equity causes, I will now state the statute declaring who are competent witnesses, or—

*Who May Be Examined as Witnesses.*

U. S. Rev. Stats. sec. 858, U. S. Comp. Stat. 1901, p. 659, provides that no witness shall be excluded on account of color, or in any civil action because he is a party thereto, or interested in the issue to be tried, except in suits by or against executors, administrators, or guardians, in which judgment may be rendered against or for them; in which case neither party shall be allowed to testify against the other as to any transaction with or statement by the intestate, testator, or ward, unless called to testify thereto by the opposite party, or required to testify by the court. *Texas v. Chiles*, 21 Wall. 488, 22 L. ed. 650. In other respects the law of the State in which the court is held shall be the rule as to the competency of witnesses. *Potter v. Third Nat. Bank*, 102 U. S. 163, 26 L. ed. 111; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 731; *Corbus v. Leonhardt*, 51 C. C. A. 636, 114 Fed. 10; *Morris v. Norton*, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 922; *Miller v. Steele*, 82 C. C. A. 572, 153 Fed. 714-720, and cases cited; *Hale v. Wharton*, 73 Fed. 748; *Huntington Nat. Bank v. Huntington Distilling Co.* 152 Fed. 240, see *DeRoux v. Girard*, 90 Fed. 537; *King v. Worthington*, 104 U. S. 50, 26 L. ed. 654; *Rev. Stat. of Texas*, 2302; *Abbott v. Stiff*, — *Tex. Civ. App.* —, 81 S. W. 562; *Pennybacker v. Hazlewood*, 26 *Tex. Civ. App.* 183, 61 S. W. 153.

*Who to Issue the Commission.*

After notice has been given, as provided by the rules and

statutes authorizing the commission to issue, the clerk of the court shall issue the commission to the commissioner or commissioners named by the court, as provided by equity rule 67 and equity rule 70. However, it is provided by an amendment to equity rule 67 (December term, 1854), that the power to name commissioners may be vested in the clerk by a general order granting this power. 144 U. S. App. p. 689, 36 L. ed. 1143. The commission issues as of course when rule complied with. Equity rule 70. If taken out according to State practice, it is required in Texas that the clerk, after completed notice to the adverse party, shall issue the commission. Tex. Rev. Stat. 2279-2280.

### *Before Whom Taken.*

If taken according to State practice, the depositions may be taken before any clerk of a district court, any judge or clerk of a county court, or any notary public in his proper county, if taken in the State. If taken out of the State, and within the United States, they may be taken before any clerk of a court of record having a seal, any notary public (U. S. Rev. Stat. sec. 863, U. S. Comp. Stat. 1901, p. 663), or any commissioner of deeds duly appointed under the State law for some other State or Territory. If taken out of the United States, the depositions may be taken before any notary public or any minister, commissioner, or *charge d'affaires* of the United States resident in and accredited to the country where taken, or any consul general, consul, viceconsul, commercial agent, vicecommercial agent, deputy consul, or consular agent of the United States resident in such country.

In the Federal court, by equity rule 67, the depositions are taken before the commissioner named by the court, or before an examiner of the court, or a special examiner *pro hac vice*, or on commission before an officer authorized to take depositions. See equity rule 70.

By U. S. Rev. Stat. sec. 863, when depositions are taken *de bene esse*, they may be taken before any judge of a court of the United States, or any commissioner of a United States circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme court or superior

court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public not being of counsel or attorney of either of the parties, or interested in the result of the cause. *Bird v. Halsy*, 87 Fed. 677.

In the supplement to U. S. Rev. Stat. of 1874, vol. 1, p. 251, it is provided that notaries public of the several States and Territories and the District of Columbia are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, as well as affidavits and acknowledgments, in the same manner and with the same effect, as a commissioner of a United States circuit court may now lawfully take or do. Act August 15, 1876. As to powers of the circuit court commissioners, see *United States v. Hom Hing*, 48 Fed. 638, note.

So depositions may be taken by a notary, under a commission addressed to any officer authorized to take depositions, whether taken *de bene esse*, or in the ordinary form. By act of May 15, 1893, witnesses may be examined before the court, who must preserve the evidence to be incorporated in the record.

In foreign countries depositions may be taken, under the Federal statutes, before a secretary of legation or consular officer. U. S. Rev. Stats. sec. 1750; U. S. Comp. Stat. 1901, p. 1196; see *Depositions to Foreign Countries*; *Stein v. Bowman*, 13 Pet. 218, 10 L. ed. 133; U. S. Rev. Stats. sec. 2157, as to taking depositions in the Indian country; also see 1 U. S. Rev. Stat. Supp. p. 251.

*How Witnesses Are Brought Before a Commissioner, Examiner, or Master, and Made to Testify.*

United States Revised Statutes, sec. 868, U. S. Comp. Stat. 1901, p. 664, provides that when a commission issues from any United States court to take the testimony of a witness named therein at any place within any district or Territory, the clerk of *any* court of the United States in such district or Territory shall, on the application of either party, issue a subpoena for such witness, requiring him to appear and testify before the commissioner named in the commission; and if such witness refuses or neglects to appear, or appearing, refuses to testify,

then the judge of the court whose clerk issues the subpoena may punish the disobedience by contempt proceedings.

By equity rule 78 it is provided that witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before a commissioner appointed to take testimony, or before a master or examiner appointed in *any* cause, by subpoena in the usual form, which may be issued in blank and filled up by the party praying for the same, or by the commissioner, master, or examiner. If any witness shall refuse to appear or give evidence, it shall be deemed a contempt, which when certified to the clerk's office issuing the subpoena, an attachment may issue thereon by order of the court or any judge thereof.

By U. S. Rev. Stats. sec. 863, it is provided that any person may be compelled to appear and testify when the testimony is taken *de bene esse*, in the same manner as witnesses may be compelled to appear and testify in court.

By equity rule 67, sec. 3, it is provided that the refusal of a witness to attend, or be sworn, or to answer any question put by an examiner, the same practice shall be adopted as now provided with respect to witnesses who refuse to answer written interrogatories. Equity rule 78; U. S. Rev. Stats. secs. 863-868, given above. *Zych v. American Car & Foundry Co.* 127 Fed. 723; *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324, 325; *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521. See *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 843.

United States Revised Statutes, sec. 869, U. S. Comp. Stat. 1901, p. 665, requires attendance of witnesses under a subpoena *duces tecum*, and compels obedience by the process of contempt. Except that it is provided by U. S. Rev. Stats. sec. 870, U. S. Comp. Stat. 1901, p. 665, that no witness shall be required under the provisions of U. S. Rev. Stats. secs. 868 and 869, to attend at any place out of the county of his residence, nor more than forty miles from the place of his residence; nor is a witness guilty of contempt under either of these sections, unless his fee for going to, returning from, and one day's attendance at the place of examination is paid or tendered him at the time of the service of the citation.

Section 871 provides for taking the testimony of a witness found within the District of Columbia, to be used in a suit depending in any State, Territory, or foreign court, and by article 873 a refusal to appear is punished as a refusal to testify before a court on a trial of the suit.

The statutes above given explain themselves, but I will call your attention to a decision in *Stevens v. Missouri, K. & T. R. Co.* 104 Fed. 937, clearly creating an exception to the rule, that a witness may be compelled to testify when subpoenaed to give evidence before a notary in a State other than the State where the cause may be pending. In the case stated, it is held that the rule does not apply unless the deposition is being taken on interrogatories under a commission. See *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 242; *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 377, approving. The court concludes that the Statutes of the United States nowhere confer upon the clerk of a court, other than the place of trial, any power to issue subpoenas, except under section 863, which provides only for such power when the depositions are to be taken under a commission, and in behalf of issues then framed.

The case discussed was pending in the southern district of New York, and in the progress of the case and before issue joined, complainants notified defendants that they would take testimony in St. Louis, Missouri, before a notary public. Subpoenas were issued by the circuit court of Missouri to the witnesses named to appear before the notary, and the witnesses appeared, but refused to be sworn, and contempt proceedings were sought in the circuit court of Missouri to require obedience. The court refused, and as a basis for its refusal, stated that there was no statute in the United States system that authorized the clerk of the Missouri circuit court to issue the subpoena.

I have given above the Federal statutes and rules of the Supreme Court, which have the force of statutes, and I think in the light of these statutes, and especially sections 2 and 3, equity rule 67, the ruling is extremely technical and narrow. The letter that killeth is preferred to the spirit that maketh alive. *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 242-243. If one will follow the history of equity rule 67, and note its gradual expansion from 1842 to May 15, 1893, it will be seen that the

Supreme Court has sought to increase the facilities for taking testimony in equity causes, and clearly intends in paragraphs 2, 3, and 4, promulgated at the December term, 1861 (1 Black. 6), to provide for any case in which it becomes necessary to take the testimony of witnesses orally, before anyone authorized to take depositions; and whenever and wherever they may be taken by commission, they may be taken orally before an officer authorized to take them, upon notice given as required by the rule; and we have seen that notaries in any State have by act of Congress the same powers to take testimony, etc., to be used in the courts of the United States, in the same manner, and with the same effect as commissioners of the circuit courts of the United States. It is specially provided in equity rule 67, paragraph 3, for contempt proceedings where the witness refuses to attend, or be sworn, or to answer.



## CHAPTER LXXXIV.

### EVIDENCE IN EQUITY SUITS (CONTINUED.)

Having thus seen the conditions under which commissions to take testimony in equity causes are issued, who may be witnesses, and the means of enforcing their attendance and testifying, I will, before discussing the different methods of taking the testimony by commission on interrogatories attached, by oral examination, and by examination in open court at the final hearing, state the statute and rules controlling

- (a) The time to begin taking testimony, and—
- (b) The time in which it must be taken.

#### *The Time to Begin.*

Equity rule 67 provides for beginning the taking of testimony *after* the cause is at issue. *Stevens v. Missouri, K. & T. R. Co.* 104 Fed. 934; *Munroe v. Atlanta Mach. Co.* 170 Fed. 863; *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 377. And equity rule 68 provides also for taking testimony after the cause is at issue, according to the *acts* of Congress, which means that the depositions may be taken after the issue by any of the methods provided by Congress for taking them either before or after issue joined, and to be found in sections 863, 866-875, U. S. Comp. Stat. 1901, pp. 661, 663-667; but a further provision is added to this rule, that whenever depositions are taken under these statutes, if no notice is given to the adverse party of the time and place of taking the deposition, he shall on motion and affidavit of the fact be entitled to a cross-examination of the witness, either under a commission or by a new deposition, if a court or a judge thereof shall under the circumstances permit it. There is no doubt of the general rule that depositions in equity cannot be taken until after the cause is at issue; that is, after replication filed. There are, however, conditions when the enforcement of the rule will lead to injustice and therefore create exceptions, which have been recognized by the Supreme Court in promulgating equity rule 70.

*Depositions May Be Taken Before Issue Joined.*

By section 863 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 661, Congress provided for taking depositions when a witness was bound on a voyage to sea; or about to leave the United States before the time of trial; or when he is ancient and infirm.

The Supreme Court in 1842 promulgated equity rule 70 providing that before the defendant had answered, a commission could issue to such commissioner as the court should direct to take the examination of a witness *de bene esse*, who was aged and infirm, or who was going out of the country, and added to the provisions found in section 863, or to any witness who was a single witness to a material fact.

It will be seen, then, that by virtue of equity rule 70, upon affidavit by the complainant of the existence of any of the conditions stated in the rule, the clerk of the court as of course will issue a commission to such commissioner as the judge may name to take the deposition of a witness before issue joined; due notice of the time and place of taking must be given to the adversary.

Again, in section 866 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 663, it is provided that any circuit court of the United States as a court of equity may direct depositions to be taken *in rei memoriam*, or any of the courts of the United States may grant a *dedimus potestatem* to take depositions, if necessary to prevent a failure or delay of justice. Depositions may be taken under this section whenever it may appear to the court that it is necessary to prevent a delay of justice, whether the application to the court be before or after issue joined. An abuse of the statute by instituting inquisitorial proceedings under it is guarded against by requiring an order of the court. *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 378; *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 994.

Again, by section 867, it is provided that any court of the United States may admit in evidence in any cause, depositions taken *in rei memoriam*, which would be so admissible in the court of a State in which the court is sitting.

In grouping and construing section 863 with equity rule 70,

to support the taking of depositions before issue joined in equity, I am aware that section 863 has been held to refer to taking depositions only after issue joined, as stated in *Flower v. MacGinniss* and *Stevens v. Missouri K. & T. R. Co.* supra. See *Frost v. Barber*, 173 Fed. 847, and cases cited. It will be seen that section 863 does not indicate by its provisions the time in which depositions *de bene esse*, *i. e.*, provisionally, can be taken, but inferentially it is indicated in the conditions under which they are permitted. Thus a witness bound on a journey beyond the reach of the court's process, or when ancient and infirm, clearly indicates that he may be examined under this section before issue joined, see *Richter v. Jerome*, 25 Fed. 679; *Lowrey v. Kusworm*, 66 Fed. 539; so it is indicated when provision is made for notice of taking when the defendant is absent, and has no attorney of record. Again, it is provided that depositions may be taken in any civil cause depending in a circuit court; which means after the bill is filed.

Section 863 was intended to provide a method of examining witnesses before the trial of a common-law case, and at any time between filing the suit and its trial, if the conditions stated rendered it urgent.

Equity rule 70, by adopting the conditions in section 863, precedent to an examination of a witness *de bene esse*, has applied them to equity causes, and permits the deposition to be thus taken from the time of filing the bill and before any issue joined.

### *De Bene Esse.*

*De bene esse* means "provisionally," and when depositions are thus permitted, it is with the intent that they may be used, provided the witness cannot be put upon the stand on the trial of the cause. *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Watson*, 50 C. C. A. 230, 112 Fed. 402; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *Texas & P. R. Co. v. Reagan*, 55 C. C. A. 427, 118 Fed. 815. See *Frost v. Barber*, 173 Fed. 848; *Zych v. American Car & Foundry Co.* 127 Fed. 723; *Hartman v. Feenaughty*, 139 Fed. 887. In this sense to take depositions *de bene esse* can only apply to causes on the law

side of the court, where the examination must be before the court, unless depositions are permitted by the acts of Congress, and the conditions under which they are taken exist at the trial. Ibid. (See "Depositions on law side.")

In equity where causes are tried upon depositions and the written record, the conditions precedent to *using* them at the trial do not apply; however, depositions taken under equity rule 70 are, in the language of the rule, taken *de bene esse*. The grounds upon which depositions are taken *de bene esse*, before issue joined, are plain, and in your application to the clerk to issue a commission, you must support it by affidavit clearly stating one or more of the grounds required by equity rule 70. *Stegner v. Blake*, 36 Fed. 183. See *Richter v. Jerome*, 25 Fed. 679. That is, it must appear under oath that your witness is aged and infirm, or about to leave the country, or is a single witness to a material fact. When this appears, the clerk of the court will as a matter of course issue the commission, as stated before, though the rule directs that a judge of the court must name the commissioner. This is done by the clerk under a general order authorizing it. Amendment to Equity Rule 67, December Term, 1854, *Arthurs v. Hart*, 17 How. 7, 15 L. ed. 30; Amendment 1892, 144 U. S. 690, 36 L. ed. 1143.

### *Notice of Taking De Bene Esse.*

When the commissioner has been named and a proper commission issued, you must at once give notice to the opposite party (sec. 863, equity rule 70), or his counsel, of the name of the witness, the time and place of taking, and before whom the depositions will be taken. The length of notice depends on circumstances (*American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961), such as the number of witnesses to be examined, also the distance and facility for communication; and the time and place must be such as not to hamper adverse counsel (*Uhle v. Burnham*, 44 Fed. 729).

### *Form of Notice.*

Title as in bill.

To C. D., Defendant, etc., or R. F., His Solicitor:

Please take notice that plaintiff will take the testimony *de bene esse* of Jno. Smith, who resides in the city of....., county of....., State of .....; that said witness is (aged and infirm, etc., see equity rule 70); that said depositions when taken will be used by plaintiff in the final hearing of the cause; that said depositions will be taken before Richard Jones, Esq., commissioner (or notary public in and for the county, etc.), who is not interested in this cause nor an attorney for either party, at the office of the said commissioner (or notary, etc.) on.....street of said city (or any other place, giving number of house, street, etc.) on the .....day of....., A. D. 19..., at 10 a. m. ( or any other hour), and said examination will proceed from day to day until completed, and said depositions will be taken according to the provisions of the acts of Congress, sections 863, 864, 865, and equity rule 67.

L. M.,  
Solicitor, etc.

### *Service of Notice.*

This notice may be served on the adverse party, or his attorney of record, and in all cases *in rem* the person having the possession at the time of seizure shall be deemed the adverse party (U. S. Rev. Stat. sec. 863, U. S. Comp. Stat. 1901, p. 661), and when there is no attorney of record, and the defendant is beyond the reach of the process of the court, or absent from the district, so that giving notice is impracticable, you must then apply to the judge to indicate what character of notice shall be given if the necessity be urgent. *Ibid.* There must be evidence that service was made, or accepted.

### *Taking the Testimony De Bene Esse.*

The testimony may be taken by written interrogatories and cross interrogatories given to the officer before taking, or by oral questions put at the time (equity rule 67, amended; *Bischoffsheim v. Baltzer*, 10 Fed. 3, 4; *Encyclopædia Britannica Co. v. Werner Co.* 138 Fed. 461); but not by both methods at the same time. (*Coates v. Merrick Thread Co.* 41 Fed. 73.) In either case the witness is brought before the commissioner, or examiner, or officer named, and is *examined* on the interrogatories and cross interrogatories, and the answers reduced to writing by the officer, or under his direction in the presence of the witness, or by the witness in the magistrate's presence. U. S. Rev. Stat. sec. 864; *Re Thomas*, 35 Fed. 823. By an amendment in 1892 to equity rule 67, it may be taken

down by a stenographer or typewriter, as the examiner may elect (144 U. S. 689, 36 L. ed. 1143); or when taken orally, it can be reduced to writing by the examiner in the form of questions put and answers given, or by consent of parties may be taken in narrative form. However taken, when completed it must be read over to the witness and signed by him in the presence of the examiner and of such of the parties or counsel as may attend. *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491. (See "How Examination Conducted in Oral Examinations.")

## CHAPTER LXXXV.

### CERTIFICATE OF OFFICER WHEN TAKEN DE BENE ESSE.

The certificate of the officer is indicated in section 865, when the deposition is taken in a law case, to wit: that it must appear that the reason for taking the deposition of the witness, as where he is about to leave the country, etc., existed at the time the deposition was taken (*Bird v. Halsy*, 87 Fed. 677. See *Stewart v. Townsend*, 41 Fed. 121); but this is not necessary in an equity case, and the following certificate may be used (*Stegner v. Blake*, 36 Fed. 184):

Caption.

Style of case, and State and county where depositions taken, then proceed:

I, C. D. (official designation), by virtue of a commission issuing out of the Circuit Court of the United States for the.....District of....., sitting at....., began the examination of witnesses *de bene esse* on the .....day of .....A. D. 19..., at my office (stating city, street and number, if any) in the above styled suit now pending in the United States Circuit Court for the.....District of....., at.....

A. B., a witness on behalf of plaintiff (or defendant) was introduced, and being duly sworn to testify the whole truth, deposes and says:

To question 1. State your name and age.

Answer.

Or if you are to take the examination orally, under an appointment as special examiner under the 67th rule of equity, or by agreement of counsel, so state in the caption, and if the counsel are present, state R. F., Esq., counsel for plaintiff, and S. R., Esq., counsel for defendant were present, and proceed:

A. B., a witness introduced in behalf of the plaintiff (or defendant), being duly sworn, etc., deposes and says in answer to question propounded to him by R. F., Esq., counsel for the....., as follows: To question 1, State your name, etc., the witness answered. Answer, and so on.

If parties have agreed to have the evidence taken in narrative form, so state.

After the depositions have been completed and signed, it should be closed with the following certificate:

STATE OF.....

County of.....

I, C. D. (official designation), do hereby certify that the above witnesses (naming them) were by me first duly sworn to testify the whole truth; that their depositions were reduced to writing by me (or in my presence by....., a stenographer, or on a typewriter by.....) in the presence of said witnesses respectively, and when completed were read over to said witnesses respectively, and subscribed by them in my presence, and such of the parties and counsel as attended.

The said depositions were taken in pursuance of the annexed notice at my office at....., beginning on the.....day of.....A. D. 19..., and continued from day to day until the.....day of.....A. D. 19..., when the same were completed.

That the parties were represented by their respective counsel in the examination of said witnesses (if such was the fact; if exhibits were offered during the evidence state) and the several exhibits attached to the depositions were offered in evidence, and marked for identification as appears in the deposition.

I further certify that I am not of counsel nor interested in any manner in the case, and it being impracticable to deliver the depositions in person I have sealed up, directed and transmitted them by due course of mail to the court in which the cause is pending. See *Donahue v. Roberts*, 19 Fed. 863; *Gartside Coal Co. v. Maxwell*, 20 Fed. 187; *Stegner v. Blake*, 36 Fed. 184, Amended Equity Rule 67, 144 U. S. 690, 36 L. ed. 1143.

In witness whereof I have hereunto set my hand and official seal (if any).

C. D.,  
Official Signature.

See *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 650; *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961; *Brown v. Ellis*, 103 Fed. 837.

While a seal to certification is not necessary (equity rule 67, paragraph 5), yet the depositions must be sealed up for transmission. U. S. Rev. Stat. sec. 865, U. S. Comp. Stat. 1901, p. 663; *Re Thomas*, 35 Fed. 337; *Brown v. Ellis*, 103 Fed. 836, 837. It is not necessary to certify that the depositions were held until mailed. *Stewart v. Townsend*, 41 Fed. 121; see *Mailing Dep.* If the depositions are taken on direct and cross interrogatories handed to the officer before taking, it must be so certified, and the interrogatories returned with the commission.



If the questions and answers are reduced to writing by a stenographer, or typewriter, under the amendment of 1892 to equity rule 67, such stenographer or typewriter must be appointed by the court, or approved by both parties (see par. 5. amend. to equity rule 67; 144 U. S. 690, Appendix), and it must be certified "that said questions and answers were taken down stenographically, and afterwards typewritten, or reduced to writing in my presence by Mr. . . . . ., a skillful stenographer appointed by the court, or approved and agreed to by both parties, and duly sworn by me."

### *Informality in Certificate.*

It has been frequently decided that statutory requirements in taking depositions *de bene esse* must be strictly pursued (Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656. Cook v. Burnley, 11 Wall. 668, 20 L. ed. 30; Bell v. Morrison, 1 Pet. 356, 7 L. ed. 176; Gartside Coal Co. v. Maxwell, 20 Fed. 187; Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495); and there must be evidence of compliance with the rule and statutory requirements. Ibid. While this is true, yet if it appears that the thing to be done has been done, the deposition will be admitted, though the certificate be informal. (Ibid.; United States v. 50 Boxes & Packages of Lace, 92 Fed. 601; Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495; Stegner v. Blake, 36 Fed. 184; Brown v. Ellis, 103 Fed. 837; Stewart v. Townsend, 41 Fed. 121), because, if informal, it may be amended to meet the facts (Donahue v. Roberts, 19 Fed. 863; Gartside Coal Co. v. Maxwell, 20 Fed. 187; Stegner v. Blake, 36 Fed. 184). If only irregular, it will be waived if not disposed of before going to trial, as will hereafter be seen. Re Thomas, 35 Fed. 823; Doane v. Glenn, 21 Wall. 35, 22 L. ed. 476; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 205, 35 L. ed. 149, 11 Sup. Ct. Rep. 500; Kansas City, Ft. S. & M. R. Co. v. Stoner, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656; Brown v. Ellis, 103 Fed. 837; See McClaskey v. Barr, 48 Fed. 138. (See "Suppressing Depositions.")

Thus the depositions will not be suppressed when the officer does not certify that he is not an attorney for either party, or

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omits to insert that he has no interest, when it appears that the depositions were taken in shorthand by a disinterested person. *Stewart v. Townsend*, 41 Fed. 121. Nor when notice is actually given, failure to attach the notice to the return of the deposition is not a ground to suppress. *Stewart v. Townsend*, 41 Fed. 121. Nor need the certificate show that he retained the depositions until mailed. *Ibid.* Nor is a seal required when taken under U. S. Rev. Stat. sec. 863, U. S. Comp. Stat. 1901, p. 661; *Brown v. Ellis*, 103 Fed. 836, 837. So a certificate as to the manner of taking down the answers of witnesses, though informal, will not be objectionable on that account. *Ibid.* Nor when taken in a different place from that contained in notice, if counsel for both parties are present. *Gartside Coal Co. v. Maxwell*, 20 Fed. 187.

*Effect of the Act of March 9, 1892, on Taking Depositions in Advance of the Issue.*

By the act of March 9, 1892, it was provided by Congress that the practice in the State courts in issuing depositions may be pursued in the Federal courts. In many of the States depositions may be taken at any stage of the case, but the provisions of these statutes authorizing depositions in advance of the issues do not apply to the Federal courts. The act of 1892 has been frequently construed, and with few exceptions it has been held that State statutes are only to be followed in the manner of taking, and do not apply to the grounds for taking depositions. *United States v. 50 Boxes & Packages of Lace*, 99 Fed. 601; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700, reviewing cases; *Zych v. American Car & Foundry Co.* 127 Fed. 728; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953; *National Cash Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502. Congress, it is held, did not enlarge the conditions under which they may be taken for use in the Federal courts. *Ibid.*; *Ex parte Fiske*, 113 U. S. 713-725, 28 L. ed. 1117-1121, 5 Sup. Ct. Rep. 724; *Shellabarger v. Oliver*, 64 Fed. 307, 308; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846. In *Ex parte Fiske*, the Supreme Court held that sec-

tion 914 of the United States Revised Statutes, conforming the practice of the Federal courts on the common-law side to the practice of the State courts, did not include an authority to take the depositions of a defendant under oath before trial; that to do so was in conflict with U. S. Rev. Stat. sec. 861, U. S. Comp. Stat. 1901, p. 661. Ibid.; *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601; *National Cash Register Co. v. Leland*, 94 Fed. 502; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700. This was a construction of a New York law permitting an examination of a party as a witness in advance of the trial. This case was followed in construing the act of 1892, with the result as above stated, and it may be stated that the Texas statute (from 2273 to 2293), in so far as it permits depositions in advance of the issues to be taken does not apply in trials in Federal courts, and this whether the suit be in law or equity. *Shellabarger v. Oliver*, 64 Fed. 307, 308; *National Cash Register Co. v. Leland*, 77 Fed. 242.

In the light of these decisions, then, depositions in advance of the issues joined cannot be taken in the Federal courts unless coming within the provisions of equity rule 70 and the statutes of the United States, sections 863, 866 and 867, as these acts were not in any way added to or modified by the act of 1892. Congress would have so stated in apt words if so intended, is the language of the decisions. *Blood v. Morrin*, 140 Fed. 919.

The Federal courts have never permitted a party to use depositions for the purpose of fishing for information, or to force a party to disclose his case by pumping him, or his witnesses out of time. Ibid. *Flower v. MacGinniss*, 50 C. C. A. 291, 112 Fed. 377; *Despeaux v. Pennsylvania R. Co.* 81 Fed. 897; *National Cash-Register Co. v. Leland*, 77 Fed. 242; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700. A contrary view has been strenuously insisted upon by Judge Lacombe of the second circuit in construing the act of 1892 (*International Tooth Crown Co. v. Hanks' Dental Asso.* 101 Fed. 306; *International Tooth Crown Co. v. Carter*, 112 Fed. 396), and by Judge Hanford in *Smith v. Northern P. R. Co.* 110 Fed. 342, but the rule as stated has been decided in the fifth circuit. *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958.

## CHAPTER LXXXVI.

### DEPOSITIONS IN REI PERPETUAM.

We have seen that the U. S. Rev. Stat. sec. 866, U. S. Comp. Stat. 1901, p. 663, provides that any circuit court may according to the *usages of chancery* direct depositions to be taken *in perpetuam*, to be used in law or equity, if they relate to matters that may be cognizable in a Federal court (*Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A.(N.S.) 673, 95 C. C. A. 600, 170 Fed. 431); and by U. S. Rev. Stat. sec. 867, any United States court may in its discretion admit in evidence depositions taken *in perpetuam*, which would be so admissible in a court of the State where such cause is pending, according to the laws thereof. While you cannot use depositions provided for under U. S. Rev. Stat. sec. 866, solely to find out what a defendant or witness will swear to, in advance of the issue (*Turner v. Shackman*, 27 Fed. 183), yet if your bill is filed and service had (*Green v. Compagnia General Italiana Di Navigation*, 82 Fed. 495), then the imperative nature of your case may be such that the court will permit testimony to be taken in advance of the issue joined, and even *ex parte* (*New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 20 Blatchf. 174, 9 Fed. 578); as when, after defendant is served with process, he absconds before answering. *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A.(N.S.) 673, 95 C. C. A. 600, 170 Fed. 430. In this last case it is said that an original bill *in perpetuam rei memoriam* according to usages of chancery and a *dedimus* to take depositions according to "common usage," are distinct methods contemplating different procedure. *Richter v. Jerome*, 25 Fed. 682.

As to when a commission will issue to take evidence *in perpetuam* in a Federal court depends on a proper construction of the words "according to usages in chancery." The provision is substantially the same as was enacted in clause 30 of the judiciary act of 1789, and it has been held that the usages re-

ferred to were such as were known to the English chancery practice in 1789. *Greene v. Compagnia Generale Italiana Di Navigation*, 82 Fed. 494; 2 Dan. Ch. Pr. 1572-1574; *Richter v. Jerome*, 25 Fed. 682; equity rule 90.

Under the usages of chancery the original bill must be filed and service had on the defendant before a commission will issue, and ordinarily, it is said, the defendant must answer before the testimony is taken, but if he has been served and refuses to answer or absconds, or conceals himself, then you may proceed *ex parte* to perpetuate the testimony. In the English cases, this is said to be the utmost extent to which courts will go in allowing the depositions of this character taken before issue joined.

In *Richter v. Union Trust Co.* (*Richter v. Jerome*) 115 U. S. 55, 29 L. ed. 345, 5 Sup. Ct. Rep. 1162, it was held that depositions *in rei perpetuam* could be taken in a case appealed to the Supreme Court from sustaining a demurrer to the bill, and pending which it became necessary to take the depositions of aged witnesses which were material and necessary, in the event the trial on its merits was permitted.

It will be noticed that the language of the statute contemplates taking this character of deposition, if it relates to matters *that may be cognizable* in courts of the United States, but it is further seen that it must be according to "the usages of chancery," so it is held under the United States laws the deposition cannot be taken in contemplation of a suit that may be brought, and in anticipation of such suit, to perpetuate the testimony. *Green v. Compagnia Generale Italiana Di Navigation*, 82 Fed. 494. A contrary view is taken in *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A. (N.S.) 673, 95 C. C. A. 600, 170 Fed. 432, wherein it is held the right exists when the complainant has an interest which cannot be made the subject of judicial inquiry at the time, and where the interest may be lost by the death of a witness. This view is supported by abundance of authority. S. C. 165 Fed. 994. See *New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co.* 11 Fed. 813, S. C. 9 Fed. 578. We may next inquire how far it can be done for use in a Federal court, when taken under a State law, if such provision is made. We have seen that by U. S. Rev. Stat. sec. 867, that a court of

the United States may in *its discretion* admit in evidence in any cause before it, any deposition taken *in perpetuum rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof. Richter v. Jerome, 25 Fed. 682; See Hanks Dental Asso. v. International Tooth Crown Co. 194 U. S. 306, 48 L. ed. 990, 24 Sup. Ct. Rep. 700.

In Texas by article 2277 of Batts' Rev. Stats., depositions may be taken by one anticipating a suit who may desire to perpetuate the testimony, and such testimony may be used in any suit by and between any parties to the statement, etc. The question arises then, Can a person who expects to be a party to a suit in a Federal court take the depositions under this statute? In New York & B. Coffee Polishing Co. v. New York Coffee Polishing Co. 20 Blatchf. 174, 9 Fed. 578, it is said the provision is intended to admit in evidence testimony of this character taken and perpetuated according to the laws of the State in which the Federal court is sitting, and does not refer to testimony perpetuated by direction of a circuit court of the United States in pursuance of the statute of the United States. See also act March 9, 1892, 27 Stat. at L. 7, chap. 14, U. S. Comp. Stat. 1901, p. 664; United States v. 50 Boxes & Packages of Lace, 92 Fed. 602, 603. See Warren v. Younger, 18 Fed. 859; National Cash Register Co. v. Leland, 77 Fed. 242.

So it may be said that it rests in the discretion of the Federal judge to permit depositions taken *in perpetuum rei memoriam* to be used in evidence when taken under the laws of the State in which the court is sitting, and this power rests upon section 867 of the United States Revised Statutes, and is not affected by the act of 1892 authorizing depositions to be taken in the Federal courts in the modes prescribed by the laws of the State in which the court is sitting.

### *Dedimus Potestatem.*

By U. S. Rev. Stat. sec. 866, it is provided that in any case where *it is necessary* to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to "common usage."

It has been held "that in any case where it is necessary," etc., means civil or criminal cases, and civil case means any case at law, or in equity. *United States v. Cameron*, 15 Fed. 794. The words "common usage" have been variously construed, but mean, so far as it may be applied to equity causes, the practice in courts of equity. *Buddicum v. Kirk*, 3 Cranch, 295, 2 L. ed. 444; *Turner v. Shackman*, 27 Fed. 183; *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 992; *Bischoffsheim v. Baltzer*, 20 Blatchf. 229, 10 Fed. 1; *Encyclopædia Britannica Co. v. Werner Co.* 138 Fed. 462; *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 602, 603; *Warren v. Younger*, 18 Fed. 862; *Green v. Compagnia Generale Italiana Di Navigation*, 82 Fed. 494; *United States v. Pings*, 4 Fed. 716; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 696. "Common usage" must be construed to mean the common usage in 1874 when the act was passed. Rev. Stat. sec. 866. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 602, 603.

The purpose of the act is evidently to provide a method for taking depositions of a witness, to prevent a failure or delay of justice where the particular conditions existing do not come within the provisions of section 863, or equity rule 70.

It is a supplementary proceeding in a case already brought, and not a method to procure testimony in anticipation of a suit. *Westinghouse Mach. Co. v. Electric Storage Battery Co.* 25 L.R.A.(N.S.) 673, 95 C. C. A. 600, 170 Fed. 432; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 694; *Zych v. American Car & Foundry Co.* 127 Fed. 724; *Turner v. Shackman*, 27 Fed. 183.

What the threatened delay of failure of justice may be which is not provided for by other acts of Congress must be left to the discretion of the court upon the facts of each particular case, when the application is made and the reasons stated. *United States v. Cameron*, 15 Fed. 794; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846; *Randall v. Venable*, 17 Fed. 163; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 517. A showing of necessity must be made. *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 847, 848. Conditions have been held imperative, and a *dedimus* issued in case of sailors in transit, and the courts have permitted the depositions to

be taken without notice, or on such terms as to notice as seemed proper in the particular case.

Equity rule 68 providing for depositions to be taken *after the cause is at issue* according to the acts of Congress embraces this section, but makes a further provision for cases in which the deposition has to be taken without notice to the adverse party of the time and place of taking, by permitting the adverse party afterwards to cross-examine the witness, or issue new depositions with the permission of the judge.

### *Certificate to a Dedimus.*

The certificate need not show the many details required under secs. 863, 864, and 865, U. S. Rev. Stat. *Jones v. Oregon C. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486; *Rhoades v. Selin*, 4 Wash. C. C. 715, Fed. Cas. No. 11,740; *Giles v. Paxson*, 36 Fed. 882; *Keene v. Meade*, 3 Pet. 9, 7 L. ed. 584. The person appointed to execute the *dedimus* represents the court, and not the parties, and the return is sufficient, showing that the witness was examined in pursuance of the commission and was duly sworn or affirmed. *Ibid.* As to form, see *Jones v. Oregon C. R. Co.* 3 Sawy. 523, Fed. Cas. No. 7,486.

### *Procedure.*

To take testimony under section 866 you must file a petition or motion to be served on the adverse party or his counsel, and it must be averred that there is a suit pending in which the testimony of the witness named will be material; that the depositions cannot be taken by the ordinary methods prescribed by the statutes or rules of court, and the aid of the court is necessary to prevent a failure or delay of justice if the evidence is not taken. The facts expected to be proven must be shown and the danger that the testimony may be lost by delay (*Westinghouse Mach. Co. v. Electric Storage Battery Co.* 165 Fed. 992-994; *Flower v. MacGinnis*, 50 C. C. A. 291, 112 Fed. 378; *Zych v. American Car & Foundry Co.* 127 Fed. 723; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846; *Richter v. Jerome*, 25 Fed. 680, 681); and the application must be made to the court.



The defendant may appear and answer, showing cause why the application should not be granted, and fourteen days is allowed to do this. *Greene v. Compagnia Generale Italiana Di Navigation*, 82 Fed. 495. If, however, the application is made for an *ex parte* examination, contemplated by equity rule 68, the necessity must be clearly stated, as where the defendant has absconded, or is beyond the reach of service, and has no counsel of record, and the situation of the witness renders his examination without delay imperative.

### *Form of Order.*

Style of Case. } In Equity.

Circuit Court of the United States.

This cause coming on to be heard on the motion of plaintiff for a *dedimus potestatem* to issue, to take the testimony of....., a material witness for plaintiff, who is now at....., and both parties being represented by counsel, and the court having considered the motion and answer thereto and the affidavits filed therewith, it is the opinion of the court that the motion should be granted. It is therefore ordered that a *dedimus potestatem* be issued in this cause, directed to A. B., Esq., at....., empowering him to examine the said.....witness, due notice of the time and place of said examination to be given to counsel of both parties (or if on interrogatories and cross interrogatories, then state).

It is ordered that a *dedimus potestatem* be issued in this cause, directed to A. B., Esq., at....., empowering him to examine....., the witness named in this cause, upon the interrogatories and cross interrogatories to be attached to the order issued herein. It is further ordered that the testimony given under such examination shall be reduced to writing, signed by the witness, certified by the said A. B., Esq., and returned by him by mail to the clerk of this court at the city of.....

The testimony thus taken shall be subject to such legal objections as may be properly made to the same on the trial of the cause.

Judge of the Circuit Court for.....District of.....

The duties of the examiner or commissioner appointed to take depositions may be regulated by the court, either by general rules or special instructions accompanying the commission. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601. See *Hollander v. Baiz*, 40 Fed. 659. The order may not state the place or time when the examination is to be held, but in this event reasonable notice must be given by the examiner or commissioner to counsel of the time and place the examina-

tion is to be held. However, when directed to a foreign country the time within which the examination is to be held, and the city or cities where it is to be held, are usually stated, requiring the examiner or commissioner to give a more specific notice of the day and place, within the period of time allotted by the order.

While it has been held that common usage limited the taking of depositions under a *dedimus* to interrogatories and cross interrogatories, yet it is the better opinion that "common usage" embraces any method of taking the examination authorized by Congress in the past or present, or according to the existing practice in equity (*Bischoffsheim v. Baltzer*, 20 Blatchf. 229, 10 Fed. 1; *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 603; *Giles v. Paxson*, 36 Fed. 882; *United States v. Cameron*, 15 Fed. 794); or by any of the methods provided by equity rule 67 as amended, or the statutory provisions of the State (*Giles v. Paxson*, 36 Fed. 882; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 517; *McLennan v. Kansas City, St. J. & C. B. R. Co.* 22 Fed. 198).

## CHAPTER LXXXVII.

### DEPOSITIONS AFTER ISSUE JOINED.

#### *Time in Which Evidence Must Be Taken.*

Having discussed the taking of depositions before issue joined, under the equity rules and statutes permitting it, I will now discuss the taking of depositions after issue joined, and, first, I will speak of the time within which you must complete your evidence in an equity cause.

By equity rule 69 it is provided that three months, and no more, shall be allowed for taking the testimony after the cause is at issue, unless the time is extended by the court, or a judge thereof, upon special cause being shown therefor, and no testimony taken after that period will be allowed to be read in evidence at the hearing. *Jewell v. State Life Ins. Co.* 99 C. C. A. 372, 176 Fed. 64; *Wenham v. Switzer*, 48 Fed. 612; *Munroe v. Atlanta Mach. Works*, 170 Fed. 863; *Wooster v. Clark*, 9 Fed. 854; *Brown v. Worster*, 113 Fed. 20; *Sharon v. Hill*, 10 Sawy. 394, 22 Fed. 29; *Western Electric Co. v. Capital Teleph. & Teleg. Co.* 86 Fed. 770; *Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. 76. This rule fixes the time within which *both* parties must have taken their testimony and filed it in the clerk's office. *Ingle v. Jones*, 9 Wall. 486, 19 L. ed. 621. The rule has been frequently declared imperative. *Ibid.*; *Wooster v. Clark*, 9 Fed. 854; *Re Thomas*, 35 Fed. 337; *McGorray v. O'Connor*, 31 C. C. A. 114, 59 U. S. App. 452, 87 Fed. 588. But the true interpretation of the rule is that it is within the discretion of the court to extend the time (*Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. 76; *Coon v. Abbott*, 37 Fed. 98; *Grant v. Phoenix Mut. L. Ins. Co.* 121 U. S. 115, 116, 30 L. ed. 908, 909, 7 Sup. Ct. Rep. 841; *Coosan Min. Co. v. Farmers' Min. Co.* 67 Fed. 32), or permit filing it *nunc pro tunc* (*Ibid.*; *Wenham v. Switzer*, 48 Fed. 612); but the discretion of the

court must be appealed to by motion, and reasonable cause must be shown. Being entirely in the hands of the court, his refusal would render depositions taken after the allotted time useless. *Emerson Co. v. Nimocks*, 88 Fed. 280.

The rule is imperative that in the absence of a proceeding to extend the time granted by the court, your depositions will be suppressed on motion, or on objection to reading. *Re Thomas*, 35 Fed. 340.

If taken orally under equity rule 67, the court may on motion assign a time within which complainant shall take his evidence in support of the bill, and a time thereafter in which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply, and no further evidence can be taken in the cause, unless by agreement of parties, or by leave of the court first obtained on motion for cause shown.

### *Framing Interrogatories.*

Before discussing the issuing of the commission to take interrogatories after issue joined, I will call your attention to certain equity rules affecting the framing of interrogatories. Where the interrogatories are contained in the original bill to be answered by the defendant, equity rules 43, 41, and 42 indicate the form to be observed. By equity rule 71 the last interrogatory when issued under a commission shall be as follows: "Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matter in question in this cause." In the State practice a general question of that kind is not permissible, for the reason given that it gives no opportunity for cross-examination.

In drawing interrogatories, the first great rule must be kept in mind, that the proof must agree with the allegation (*Providence Rubber Co. v. Goodyear*, 9 Wall. 793, 19 L. ed. 567; *Foster v. Goddard*, 1 Black, 518, 17 L. ed. 232; *Phelps v. Elliott*, 35 Fed. 461; *Boone v. Chiles*, 10 Pet. 177, 9 L. ed. 388), and must be confined to matters in the bill. (*Gormully & J. Mfg. Co. v. Bretz*, 64 Fed. 612). In a word, the substance of

the interrogatories must be directed to the proof of the material facts not admitted in the answer.

*How Witnesses Examined After Issue Joined.*

As before stated, there are three ways of examining witnesses after issue joined, that is, after the filing of the replication.

First. By commission on interrogatories and cross interrogatories.

Second. By oral examination before a commissioner or examiner appointed for that purpose or agreed upon by the parties.

Third. By examination of witnesses in open court at the final hearing, as at law.

*First, By Commission on Interrogatories.*

This course may be pursued under equity rule 67 or under the act of March 9, 1892, authorizing depositions to be taken under State laws. *National Cash Register Co. v. Leland*, 77 Fed. 242; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 846; *Hanks Dental Asso. v. International Tooth Co.* 194 U. S. 308, 48 L. ed. 991, 24 Sup. Ct. Rep. 700; *Wallace v. D. Appleton & Co.* 161 Fed. 884. These cases confine the act of 1892 simply to the method of taking by the States, and not the instances on which depositions may be taken, these are fixed by the Federal law. *Hartman v. Feenaughty*, 139 Fed. 888.

The act of 1892 is as follows: "That in addition to the modes of taking the depositions in causes pending in law and equity in the United States circuit and district courts, it shall be lawful to take them in the mode prescribed by the laws of the State in which the courts are held." 27 Stat. at L. p. 7, chap. 14, U. S. Comp. Stat. 1901, p. 664.

Equity rule 67 provides that after the cause is at issue, a commission to take testimony may be taken out in vacation as well as in term time, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office. *Ten days' notice* must be given to the adverse party within which time he must file his cross interrogatories, after which time the clerk may issue the com-

mission, and this may be done *ex parte*, if no cross interrogatories are filed. The rule further provides that the court or judge shall name the commissioner or commissioners who are to take the deposition. This part of the rule was subsequently amended so as to permit the judge to vest in the clerk of the court by general order the power to name the commissioner who is to execute the commission. This amendment was carried into equity rule 67 as amended in 1892.

You may address a note to the clerk asking for the selection of some proper person as commissioner, and for a commission authorizing him to take the depositions, but when the time has elapsed after filing your interrogatories, the clerk will issue the commission without this formality. I will not dwell upon the issuing of a commission upon interrogatories, or cross interrogatories, filed in the clerk's office, as provided by equity rule 67. The practice is similar to the practice in your State courts, with which it is presumed you are familiar. In Texas the difference lies in the time of the notice to the adverse party, it being ten days in the Federal court, and five days in the State court. Again, in the Federal court; it is required by equity rule 67 that the commissioner be named in the commission, while in the State court it may be addressed to any officer authorized to take the depositions. In Texas they may be taken before any clerk of the district court, or any judge or clerk of the county court, or any notary public of the proper county, if taken within the State. If without the State, and within the United States, any clerk of a court of record having a seal, or any notary public, or any commissioner of deeds appointed in any State or Territory under the laws of Texas. If out of the United States, any notary public or any minister, commissioner, or *charge d'affaires* of the United States resident in the country where taken, or before any consul general, consul, vice consul, commercial agent, vice commercial agent, deputy consul, or consular agent of the United States resident in such country.

The act of 1892, just referred to, permits you to take depositions in the United States courts in the same mode as is authorized by your State practice. You have an election between the Federal rule and the State practice. You must, however, bear in mind that the *mode* of taking the depositions is au-

thorized, and not the causes or grounds for taking, which are provided in the Federal statutes and rules, as will be hereafter explained. (Authorities above.)

*Second, By Oral Examination.*

By the second paragraph of equity rule 67 it is provided that either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or a special examiner appointed for that purpose by the court. The rule is applicable to depositions taken on commission under Rev. Stat. § 866, U. S. Comp. Stat. 1901, p. 663; *Encyclopædia Britannia Co. v. Werner Co.* 138 Fed. 461; See *Edison Electric Co. v. Westinghouse, C. K. & Co.* 138 Fed. 460; *Wallace v. D. Appleton & Co.* 161 Fed. 884; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 847; *Re Allis*, 44 Fed. 216.

It is here proper to call your attention to the fact that oral examinations and oral testimony are not synonymous. Oral testimony is spoken in the presence of the court, and an oral examination is evidence taken orally before an official authorized to take it, as if in court, but reduced to writing to be subsequently used in court. *Indianapolis Water Co. v. American Straw-Board Co.* 65 Fed. 535. (See "Oral Testimony at Hearing.") Whoever is appointed to take the testimony orally is to be furnished, if he requests it, with a copy of the pleadings. Equity rule 67, as amended in 1892. This examination takes place in the presence of the parties, or their agents or attorneys, and the examination is conducted, as near as may be, as in courts of law. The examination cannot, however, be had on part oral and part written interrogatories. *Coates v. Merrick Thread Co.* 41 Fed. 73.

Where an open commission to examine witnesses is given in a remote jurisdiction, the adverse party may properly be given the election to cross-examine after the direct evidence has been returned, either orally or on written interrogatories. *Maryland Trust Co. v. Kirby Lumber Co.* 149 Fed. 443; *Edison Electric Co. v. Westinghouse, C. K. & Co.* 138 Fed. 460.

*Appointment of Examiners.*

Prior to 1862 the testimony could be taken by commission, or *orally by consent*, but in December, 1861, 1 Black. 6, either party could demand the appointment of an examiner. The rule requires, as we see, notice to be given, that either party desires the evidence to be taken orally, and thereupon the witnesses must be examined orally. The notice to be given is as follows:

Title as in bill.

To A. B., Solicitor, etc.:

You will please take notice that the plaintiff E. F. (or the defendants, etc.) in the above cause desires the evidence in this case to be taken orally under equity rule 67, and will in pursuance thereof apply to the Hon. ...., Judge, etc., on the.....day of....., A. D. 19..., to appoint John Smith, who is a citizen of....., in the county of ....., in the State of ..... (or Richard Roe, the standing master of this court) as examiner, under the provisions of equity rule 67 in equity to take the testimony of witnesses for the plaintiff (or defendant) to be used in the trial of the above cause in behalf of plaintiff.

R. F.,  
Solicitor, etc.

If the examiner is to be appointed beyond the territorial jurisdiction of the court, then state in your notice:

To appoint John Smith, Esq., who resides in ....., in the county of ....., in the State of ....., a special examiner to take the testimony of (name witnesses) material witnesses for plaintiff (or defendant) in the above cause, who reside at ....., in the county of ....., in the State of....., and such other witnesses as there may be brought before him.

The motion for appointment of the examiner may be as follows:

Title as in bill.

And now comes A. B., plaintiff (or defendant) and says that the above cause is now at issue, and that he desires that the evidence to be adduced in the cause shall be taken orally, wherefore he moves the court to appoint John Smith, Esq., a special examiner to take the testimony of the witnesses in this cause under the provisions of equity rule 67.

R. F.,  
Solicitor, etc.



The form is changed in accordance with the extent of the order, either within, or without the territorial jurisdiction of the court. The motion made is only by way of suggestion, and the issue under the rule is not whether the appointment be made, but who shall be appointed.

*Order Appointing Examiner.*

**Title as in bill.**

It appearing that notice of the motion herein filed for the appointment of a special examiner in this cause to take the testimony in this case has been duly served (or by consent), it is ordered that John Smith, Esq., of ....., be and he is hereby appointed special examiner under equity rule 67 to take the depositions in this cause of the witnesses that may be brought before him for and in behalf of plaintiff (or defendant, or both).  
Judge, etc.

The order appointing him as examiner having been duly entered, your next step is to see that the examiner is served with a certified copy of the order appointing him, and he should be furnished with a copy of such pleadings as show the issues involved. When the examination is to be within the territorial limits of the court, such matters are usually referred to the standing master or special master as examiner, but beyond the jurisdiction, a special examiner is named, usually agreed upon or appointed by the court upon suggestion of names, or the court may appoint whom he pleases. The time stated in notice must be reasonably sufficient. *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961.

The question of the power of the court to appoint an examiner beyond the territorial limits of his jurisdiction has been variously decided by the Federal courts. Judge Lacombe, of the second circuit, following the practice laid down by Judge Blatchford, has refused such applications in his district, and when parties live beyond the reach of his subpoena, their evidence must be taken on written interrogatories and commission. The judge seems to fear grave abuses may be committed by putting it in the power of a party to appoint examiners in several States to begin taking testimony on the same day, (*Arnold v. Cheeseborough*, 35 Fed. 16), so as to prevent opposite  
S. Eq.—35.

counsel from being present at all of the examinations, when it is extremely important that he should be. *Ibid.* Uhle v. Burnham, 44 Fed. 729. No reason is given why this apprehended inconvenience cannot be controlled by the court as in Uhle v. Burnham, 44 Fed. 729, 730; White v. Toledo, St. L. & K. C. R. Co. 24 C. C. A. 467, 51 U. S. App. 54, 79 Fed. 133. See Consolidated Fastener Co. v. Columbian Button & Fastener Co. 85 Fed. 54. The practice of appointing examiners beyond the limits of the court's jurisdiction has always been the practice of the fifth circuit, following the opinion of Judge Bradley in Schutte v. Florida C. R. Co. 3 Woods, 692-697, Fed. Cas. No. 17,434, decided on circuit, White v. Toledo, St. L. & K. C. R. Co. 24 C. C. A. 467, 51 U. S. App. 54, 79 Fed. 133; Davis v. Davis, 90 Fed. 791; Equity Rule 67

*Time Within Which the Testimony is to Be Taken Before Examiner*

We have seen that three months is allowed to take testimony, and when the evidence is to be taken orally before an examiner, the court may, on motion of either party, divide the time in such manner as he may deem equitable, if he is to take all the testimony, and may assign a time within which plaintiff must take his testimony, and a time thereafter within which defendant must take his testimony, and a time within which plaintiff may rebut, and no further evidence shall be allowed, except for cause shown on motion. Equity rule 67, sec. 7; Brown v. Worster, 113 Fed. 20.

*Notice of Examination.*

As soon as possible after the appointment of an examiner, the taking of testimony should begin. The examiner should notify counsel of his readiness to begin, and where the hearing will take place. You should then serve notice as follows:

Title as in bill.

To A. B., Solicitor for, etc.:

You will please take notice that Jno. Smith, Esq., having been appointed by the Hon . . . . ., Judge of the Circuit Court for the . . . . . District of Texas, a special examiner to take the testimony of witnesses for and

in behalf of plaintiff (or defendant) will begin said examination on the ..... day of ....., A. D. 19...., at 10 a. m., at (here designate place, specially stating street, house, number, city, county and State), and that he will proceed with said examination from day to day until completed.

R. F.,  
Solicitor.

Notice accepted this the ..... day of ....., A. D. 19....

A. B.,  
Solicitor.

#### Equity rule 67, sec. 4.

However, the examiner usually notifies counsel when and where he will begin the examination, which is sufficient where the examination is held within the district. If the time set in the notice be too short, or not convenient, the examiner may, if such fact is shown, fix a further time for hearing, duly notifying counsel of the change made, and the day fixed for the examination, and he may adjourn the examination from day to day until completed, or to such time as may be most convenient for counsel or himself, bearing in mind that the examination must be completed within the time fixed by the rule, unless extended by the court on application and cause shown. Equity rule 67, sec. 4; *Wenham v. Switzer*, 48 Fed. 612. See *Uhle v. Burnham*, 44 Fed. 729.

#### *Examination of Witnesses.*

First. Process for.—Counsel must furnish the examiner with the names of the witnesses he proposes to examine, and if necessary to bring them in by process (equity rule 78), the examiner will use the blank subpoenas furnished by the clerk of the court in which the suit is pending, and when prepared, the examiner will deliver them to the United States marshal to be served, or to a deputy usually provided to attend the examiner, for service on the witnesses. Equity rule 78; U. S. Rev. Stat. sec. 868, U. S. Comp. Stat. 1901, p. 664.

If the examination is being held in another Federal district, and over one hundred miles from the place where the suit is pending, then the clerk of the United States circuit court of the district in which the examination is being held should issue

the subpoenas upon application of the examiner (U. S. Rev. Stat. sec. 876, U. S. Comp. Stat. 1901, p. 667; *Meyer v. Consolidated Ice Co.* 163 Fed. 400), and this subpoena must be served by the officers of the Federal district in which the examination is being held. *Re Allis*, 44 Fed. 217; equity rule 67.

Note that the subpoena must be issued by the clerk of the court in which the suit is pending, if the witness resides, or is within a hundred miles of the place of suit, though in another district. U. S. Rev. Stat. sec. 876, provides that a subpoena may run into any other district, if the witness lives within a hundred miles of the courthouse where the court is held and from which the subpoena is issued. See sec. 868. *Meyer v. Consolidated Ice Co.* 163 Fed. 404. And a witness under sec. 863, U. S. Rev. Stat. may be required to appear and submit to an examination outside the district in which the suit is pending. *Davis v. Davis*, 90 Fed. 791.

By sec. 870, U. S. Rev. Stat., no witness under a *dedimus potestatem* shall be required to attend out of the county of his residence, nor more than forty miles from his residence, and no witness is guilty of contempt for nonattendance unless his fees are paid or tendered when service is made. The fees to be tendered or paid must be the expense of going to and returning from the place of examination, and one day's attendance. This being done, the witness must obey. U. S. Rev. Stat. sec. 868; *Norris v. Hassler*, 23 Fed. 581; *Re Boeshore*, 125 Fed. 652; *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 843. If the witness refuses to appear, or, appearing, refuses to answer, it is deemed a contempt of court, if he is not otherwise privileged from giving testimony. The refusal to appear, or appearing, to answer, must be certified to the clerk's office from which the subpoena issued, by the examiner, and the Judge of the court may proceed to enforce obedience to the process, as in like cases in any court. U. S. Rev. Stat. sec. 868; equity rules 78, 67, sec. 2, par. 5; *Re Spofford*, 62 Fed. 443; *Re Allis*, 44 Fed. 217; *Bird v. Halsy*, 87 Fed. 675; *Re Steward*, 29 Fed. 813; *Western Div. of Western N. C. R. Co. v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434; *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* 48 Fed. 192; *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324.

The question has arisen as to whose duty it is to pass upon the relevancy or materiality of the evidence when taken in a district other than that of the trial.

In *Dowagiac Mfg. Co. v. Lochren*, 74 C. C. A. 341, 143 Fed. 211-215, 6 A. & E. Ann. Cas. 573, and cases cited, it is said that it is not the duty of the auxiliary judge to consider or determine these questions, but only to compel the production of the evidence though deemed incompetent or irrelevant by him, but with the proviso that he will not compel privileged evidence, or a privileged witness to testify, nor when there is no doubt that the evidence sought is incompetent, immaterial, or irrelevant. The rule thus laid down applies to equity rules 67 and 68, and when the evidence is taken by a master under rules 74, 77, 78, 79, and 82, in equity, as well as to evidence under sections 863, 868, and 869, at law. *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521; See *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241. In *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.* 139 Fed. 844, Judge Lacombe thought it best to send back the question of materiality and relevancy to the trial judge, and upon his determination of the matter to compel or not the witness to answer; but in this his associates differed with him, and the rule as above stated was enforced. See *New England Phonograph Co. v. National Phonograph Co.* 148 Fed. 324 and cases cited; *Fayerweather v. Ritch*, 89 Fed. 529; *Maxim Nordenfelt Guns & Ammunition Co. v. Colts Patent Firearms Mfg. Co.* 103 Fed. 39; *Lloyd v. Pennie*, 50 Fed. 4-12; *Parisian Comb Co. v. Eschwege*, 92 Fed. 721. These cases overrule the conclusion reached in *Re Allis*, 44 Fed. 216. Except under the conditions above stated, the witness will be compelled to answer. *Perry v. Rubber Tire Wheel Co.* 138 Fed. 836; *Robinson v. Philadelphia R. Co.* 28 Fed. 341.

*Subpœna duces tecum.*

Nature of.—By sec. 869, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 665, a *subpœna duces tecum* under a *dedimus potestatem* requires a witness to appear and testify, and to bring with him to be produced before the court, commissioner, or examiner, any paper, writing, book, or document in his

possession or power, material to the investigation. *Re Shepard*, 3 Fed. 12. The book, paper, document, etc., sought must be described in the application, supported by affidavit; and in the subpœna, if the court is satisfied it should be issued; and the order made to the clerk to issue it completes the process. This section regulates the issuing of these subpœnas in the United States courts and also applies to cases where depositions are taken *de bene esse* under sec. 863 or *in perpetuam* under sec. 866 (*Davis v. Davis*, 90 Fed. 791; *Kirkpatrick v. Pope Mfg. Co.* 61 Fed. 48), or when a *dedimus* is issued. In *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* 48 Fed. 191, it is said sec. 869 does not apply to depositions taken under equity rule 67, where a special examiner has been appointed to take testimony in another district, in that an order of a court to issue the subpœna is not necessary, but it may be issued by the clerk of the court of the district in which the evidence is taken, without any direct order of the court, but this is not the proper practice. The subpœna should only be issued under the order of a court under this section, for reasons lucidly set forth in *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 760, 762; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

*Application for and description of instrument.*

Sec. 869, which, as said, regulates the issuing of *subpœnas duces tecum* in the courts of the United States, requires an application to the judge of the district, to be supported by the affidavit of the party applying, and the Court, being satisfied, by the affidavit or otherwise, that there is reason to believe that the paper, document, etc. is in the possession or power of the witness, and that the same if produced would be competent and material evidence for the party applying, may order the clerk to issue the subpœna. See *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 162; also *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 142. Of course, the instrument, etc., should be described in the application as a basis for issuing the subpœna, which must contain the description. If the instrument is not properly described, the production will be refused. *Murray v. Louisiana*, 163 U. S. 107, 41 L. ed. 89, 16

Sup. Ct. Rep. 990, 10 Am. Crim. Rep. 242. But if properly described, the witness must produce what is called for. Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 297; S. C. 45 Fed. 55; Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 195. In Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 176, it is said generally in the designation of books or writings is not objectionable if the subject-matter to which they relate is specifically mentioned in the motion and subpoena. When properly described, the witness cannot say he delivered them to his counsel, but must produce them, as they are still in his power. Edison Electric Light Co. v. United States Electric Lighting Co. 44 Fed. 297; see S. C. 45 Fed. 55; see Davis v. Davis, 90 Fed. 792.

### *Exceptions to Rule.*

A call for private papers not in issue will not be enforced (Dancel v. Goodyear Shoe Machinery Co. 128 Fed. 754-762); nor when the call is for a cart load of books (Ibid.); nor to reveal trade secrets (Crocker-Wheeler Co. v. Bullock, 134 Fed. 241; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 176; but see Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 191).

### *When Issued in Law Causes.*

By sec. 724, U. S. Comp. Stat. 1901, p. 583, in causes at law the court may on motion grant to either party, after due notice thereof, an order requiring the parties to produce books or other writings in their possession or power, which contain evidence pertinent to the issue, under circumstances in which they may be compelled to produce the same by the ordinary rules of proceeding in Chancery. The whole purpose of this section was to eliminate the formality of going into a court of equity for a bill of discovery. Owyhee Land & Irrig. Co. v. Tautphaus, 48 C. C. A. 535, 109 Fed. 547; Ryder v. Bate-man, 93 Fed. 31; Kirkpatrick v. Pope Mfg. Co. 61 Fed. 48. This section applies only to causes at law, but before granting the order, the party applying must make reasonable proof of

the existence of the documents, etc., and their pertinency to the issues, and the possession or control of the opposite party. *Ibid.*; *Owyhee Land & Irrig. Co. v. Tautphaus*, 48 C. C. A. 535, 109 Fed. 547; *Paine v. Warren*, 33 Fed. 357. It is not a matter of right, as the issuing of a *subpœna ad testificandum*, but the court exercises a discretion, following the practice in such cases in chancery. *Gregory v. Chicago, M. & St. P. R. Co.* 3 McCrary, 374, 10 Fed. 529; *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 761, 762. However, in *American Lithographic Co. v. Werckmeister*, 91 C. C. A. 376, 165 Fed. 426, the court held that the power to require the production of documentary evidence was not limited to an order made on motion, as provided by sec. 724, but that under Rev. Stat. sec. 716, that it had express power, as well as its inherent power to issue any writ necessary for the proper exercise of its jurisdiction.

### *Penalty for Refusal.*

Sec. 724 provides a penalty if the plaintiff or defendant fails to comply with the order, to wit, nonsuit in case of the plaintiff, and judgment by default in case the defendant fails to comply (*Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175, S. C. 110 Fed. 76), but not when the action is penal, or for the recovery of penalties, as, for instance, under sec. 4901 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 3388, *Newgold v. American Electrical Novelty & Mfg. Co.* 108 Fed. 341, 342.

### *In Equity Cases.*

So far, then, we see that this chancery power was given to courts of law to avoid an appeal to equity for discovery, but in equity the chancery rules and procedure in issuing the *subpœna duces tecum* have not been changed. *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 140.

A *subpœna duces tecum* may issue when the depositions in chancery are taken under equity rule 67, and whether taken under a commission on direct or cross interrogatories, or orally before an examiner. In *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* 48 Fed. 191, it is said that when a



special examiner has been appointed under equity rule 67 to take testimony in another district, a *subpœna duces tecum* may issue upon direct application to the clerk of the district in which the examination is being held, and without an order of court. The court bases its opinion upon the 78th rule of equity, permitting *subpœnas ad testificandum* to be issued in blank, to be filled up by the commissioner master, or examiner, as may be required during the taking of evidence, but this is clearly a wrong application of the rule. As said in *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 762, the settled practice of the courts is not to issue *subpœnas duces tecum* under sec. 863, U. S. Comp. Stat. 1901, p. 661, or rule 67, except by order of the court and upon preliminary proofs of necessity. There is no question, that whether depositions are being taken under a commission *de bene esse* (U. S. Rev. Stat. sec. 863) or a *dedimus* under U. S. Rev. Stat. sec. 869, or under equity rule 70, that there must be an application and an order, as heretofore stated, as a basis for contempt proceedings in case of refusal to obey the subpœna. *Dancel v. Goodyear Shoe Machinery Co.* 128 Fed. 761, 762; see *West Pub. Co. v. Edward Thompson Co.* 151 Fed. 141; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 242, 243; *Gregory v. Chicago, M. & St. P. R. Co.* 3 McCrary, 374, 10 Fed. 529. In *Dancel v. Goodyear Shoe Machinery Co.* supra, it is said a notary public taking depositions has no power to issue a *subpœna duces tecum*. In *Pepper v. Rogers*, 137 Fed. 173, it is said that when papers are produced before an examiner by witnesses under a *subpœna duces tecum*, the court cannot order the examiner to remove them to another district, to be used in the examination of other witnesses.

## CHAPTER LXXXVIII.

### HOW EXAMINATION TO BE CONDUCTED.

The examination of the witness takes place in the presence of the commissioner, examiner, and the parties, or their agents, and by the commissioner or examiner or counsel, if present, and the witnesses are subject to cross-examination or re-examination if taken orally, as if upon the stand in court. Equity rule 67, par. 2.

Any question objected to must be noted, with objections made, but the examiner has no power to decide on the competency, materiality, or relevancy of the question asked. Equity rule 67, par. 2. The court alone can deal with the competency and relevancy; nor will the court pass upon it during the examination of the witness. *Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co.* 103 Fed. 39; *Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 702; *Brown v. Worster*, 113 Fed. 20; *Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 523; *Whitehead & H. Co. v. O'Callahan*, 130 Fed. 243; *Re Romine*, 138 Fed. 839; *Diamond Drill & Mach. Co. v. Kelly Bros.* 120 Fed. 282. The court can control irrelevant questions by charging up the costs, where there is a reckless disregard of the rules of evidence. *Ibid.* This may be met by motion to strike out the irrelevant evidence and charge up the costs. *Griffith v. Shaw*, 89 Fed. 313.

Counsel cannot instruct a witness not to answer a question, unless it is criminating (*Thompson-Houston Electric Co. v. Jeffrey Mfg. Co.* 83 Fed. 614), nor can the examination be stopped to refer the relevancy of the question to the court (*De Roux v. Girard*, 90 Fed. 537; *Parisian Comb Co. v. Eschwege*, 92 Fed. 721). Again, an examiner is not under the instruction of counsel, and they cannot stop the examination (*Re Rindskopf*, 24 Fed. 542), nor control it in any way. *First Nat. Bank v. Forest*, 44 Fed. 246; *J. L. Mott Iron-Works v. Standard Mfg. Co.* 48 Fed. 345.

*The Examination is to Be Reduced to Writing.*

The examiner is to reduce to writing the questions and answers as put and given, or by consent of parties it may be written in narrative form. By amendment of equity rule 67 in 1892 (see Appendix), the questions and answers may be taken by a stenographer, or typewriter, as the examiner may elect. *Brown v. Ellis*, 103 Fed. 837. It has been held that it was not properly taken, if not reduced to writing, under sections 863 and 864 (*Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491; *Cook v. Burnley*, 11 Wall. 659, 20 L. ed. 29), and not admissible in evidence.

In *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495, the questions and answers were taken stenographically, but were not reduced to writing in presence of witness, or read over to him after they had been written out. They were not admissible. *Ibid.* See *Re Thomas*, 35 Fed. 822. When completed, whether taken down by a stenographer or written down by the examiner, he should read it over to the witness, or it should be read over to the witness in the presence of the examiner, and be signed by the witness in the presence of the examiner and of such of the parties or counsel as may attend. U. S. Rev. Stat. sec. 864, U. S. Comp. Stat. 1901 p. 662, equity rule 67, sec. 2. If the witness refuses to sign, the examiner shall sign them, stating in the record the reasons, if any, given by the witness why he did not sign (equity rule 67, as amended in 1892); and he may state any other special matters that he may think fit to be presented in the report of his action.

*How Authenticated and Transmitted.*

By equity rule 67, par. 5, it is required that when the original deposition is completed, that it shall be authenticated by the signature of the examiner, and be transmitted by him to the clerk of the court in which the suit is pending, to be filed there in the same manner as is prescribed in section 865 of the United States Revised Statutes.

This section provides that the magistrate taking the deposition shall deliver it with his own hand into the court for which it is taken, or it shall, together with a certificate of the reasons

for taking it, and of the notice, if any, given to the parties, be sealed up and directed to the court, and remain under seal until opened in court. See "Mailing Depositions." As to certificate of officer see "Defective Certificate," chapter 89. *Re Thomas*, 35 Fed. 340, 824; *The Saranac*, 132 Fed. 942; *Stewart v. Townsend*, 41 Fed. 121; see *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 248.

### *Oral Examination at the Hearing.*

Prior to 1842, when the rule embodied in U. S. Rev. Stat. sec. 862, was passed, oral examinations of witnesses in open court were permitted. By that act it was provided that the mode of proof in equity causes should be according to rules prescribed by the Supreme Court. U. S. Rev. Stat. sec. 917, U. S. Comp. Stat. 1901, p. 684, gave to the Supreme Court the power to prescribe the modes of taking and obtaining evidence in suits in equity, not inconsistent with the laws of Congress.

The Supreme Court promulgated in 1842 equity rules 67, 68, and 69, superseding the rules promulgated in 1822, and required proofs in equity causes to be taken by depositions, as before explained. In the same year, 1842, equity rule 78 was issued, providing for summoning witnesses to be examined on interrogatories or before an examiner, but the latter clause of the rule left it entirely discretionary with the court to still order an examination *viva voce* when witnesses were produced in open court. *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521. The uniform practice under the rules of 1842 was to require the proof by deposition, or before examiners, and in *Western Div. of Western N. C. R. Co. v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434, it was held that it was not the proper construction of equity rule 78 to permit it; that the substantial evidence in equity cases must be taken under equity rule 67. *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521.

On May 15, 1893, equity rule 67 was amended and the following provision added (149 U. S. 793, 37 L. ed. 1235): "Upon due notice given, as prescribed by a previous amendment (May 2, 1892), (144 U. S. 689, 36 L. ed. 1143), the

court may, at its discretion, permit the whole or any specific part of the evidence in an equity cause to be adduced orally in open court on final hearing." *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 274; *Magone v. Colorado Smelting & Min. Co.* 135 Fed. 847.

In *Hyams v. Federal Coal & Coke Co.* 82 C. C. A. 324, 152 Fed. 970, it is said that the amendment of 1893 does not authorize the Court to require an unwilling party to so adduce evidence.

The amendment of the rule as above seems to be a suggestion of the Supreme Court that the courts change the practice, though the discretion of the court to permit oral testimony at the hearing in open court was left without control. As usual, the courts differ in the use of this discretion, some regarding the practice as an innovation without advantage in its exercise, while others permit it under pressing circumstances, and others again are liberal in their construction of the amendment. *Ibid.*

### *Application for Taking Testimony Orally or at the Hearing.*

It is necessary to apply by motion to the court for permission to examine the witnesses orally at the final hearing as at law, and you may use the following form:

Title as in bill; address to court.

And now comes the plaintiff (or defendant), and moves the court for permission to present his witness or witnesses (naming them) at the final hearing, and that his (or their) evidence be taken orally as provided by equity rule 67 as amended May 15, 1893, promulgated by the Supreme Court of the United States to govern the taking of testimony in equity causes.

R. F.,  
Solicitor.

See *Hyams v. Federal Coal & Coke Co.* 82 C. C. A. 324, 152 Fed. 971.

You may file the motion in the general form above given, or it may be necessary, according to the temper of the judge, to state in your motion specific reasons for asking for an oral examination in open court.

*When Application Should Be Made.*

Again, remembering that you have only a limited time for taking testimony, your motion should be made in such time that if the court should refuse your application, you would have sufficient opportunity to take the depositions in the usual way. *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 274.

*Evidence Thus Taken Reduced to Writing.*

As all equity cases are tried on the record, which must contain all the evidence taken, you must, in case the examination of the witnesses is oral, in open court, have the testimony taken down in writing and signed by the witness, or the judge in his discretion may have only the substance of the testimony reduced to writing, and in either case it must be filed as a part of the record. *Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 523; *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 275.

## CHAPTER LXXXIX.

### RETURNING AND FILING DEPOSITIONS.

By equity rule 67, sec. 5, it is provided that when the examination is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be filed for record in the same mode as prescribed in sec. 865 of the Revised Statutes of the United States, which provides that the officer taking shall retain the depositions until delivered with his own hand into court, or shall transmit the same under seal, and in such case they are to remain under seal until opened in court. When transmitted they must be sealed up, and if not sealed when received they will be suppressed (*Re Thomas*, 35 Fed. 337-340); but it seems that where the package was sealed with the express company's seal, and the name of the commissioner written across, it was held sufficient (*Egbert v. Citizens' Ins. Co.* 2 McCrary, 386, 7 Fed. 47; *Brown v. Ellis*, 103 Fed. 836, 837).

When parties agree that the depositions may be taken before any officer or magistrate authorized to administer oaths, without special appointment by the court of an examiner, they must be returned and filed as required by equity rule 67, sec. 5, (*J. L. Mott Iron Works v. Standard Mfg. Co.* 48 Fed. 345), and it cannot be held back under instructions from counsel of the party on whose behalf the witness was examined. *Ibid.*; *First Nat. Bank v. Forest*, 44 Fed. 246.

#### *Returning by Mail.*

The envelop should be addressed to the clerk of the court issuing the commission, marked with the style of the case, sealed, and the commissioner taking should indorse his name across the seal. *Egbert v. Citizens Ins. Co.* 2 McCrary, 386,

7 Fed. 47; *Stewart v. Townsend*, 41 Fed. 121. It may then be sent by mail or express; the rule requires it simply to be transmitted. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 604; *Batts' Rev. Stat. (Tex.)* 2286.

### *Publication of Depositions.*

The next step to be taken is the publication of the depositions. By equity rule 69 it is provided that immediately on the return of the depositions and commission, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the other party, or it may be enlarged as he may deem reasonable under all the circumstances; but by consent of the parties, publication may at any time pass in the clerk's office, such consent being in writing and a copy thereof entered in the order book, or indorsed upon the deposition.

The uniform practice is to file a consent to publication as the depositions come in. Consent may be filed as follows:

Title as in bill.

We consent to the publication and opening of the depositions taken in the above cause without prejudice to any objections other than relating to publication and opening, which is hereby waived.

Signed by counsel for both parties.

If consent cannot be obtained, then an application to a judge at any time to permit opening the depositions can be made by a simple motion. Notice of time and place of the application should be given to the adverse party or his counsel. Without serious objection, the court will grant the order. *Stewart v. Townsend*, 41 Fed. 122; *Eillert v. Craps*, 44 Fed. 792; *California v. Southern P. Co.* 153 U. S. 245, 38 L. ed. 704, 14 Sup. Ct. Rep. 1138. When consent given, it waives irregularities in transmission, unless otherwise stated. *Stewart v. Townsend*, 41 Fed. 121.

### *Exhibits.*

When exhibits are offered in connection with testimony, they must be attached, and if copies, the officer must certify that he has compared the copies with original. *The Holladay Case*,



27 Fed. 842. It is not necessary to place a certificate on the exhibits, but they may be referred to in the certificate to the depositions, and the commissioner may send them in a separate envelop (Bird v. Halsy, 87 Fed. 672; Dundee Mortg. & T. Invest. Co. v. Cooper, 26 Fed. 670, 671; United States v. 50 Boxes & Packages of Lace, 92 Fed. 601); or they may be identified in any manner that will make certain the fact that they are the paper offered in connection with the evidence (Ibid.); and mailing them in separate packages is permissible (Bird v. Halsy, 87 Fed. 671, 672).

### *Depositions to Foreign Countries.*

Sections 863 and 864 of the United States Revised Statutes, U. S. Comp. Stat. 1901, pp. 661, 663, refer to taking depositions within the United States, as is clearly shown by the designation of the officers authorized to take them. Encyclopædia Britannia Co. v. Werner Co. 138 Fed. 461; Bird v. Halsy, 87 Fed. 667; Cortes Co. v. Tannhauser, 21 Blatchf. 552, 18 Fed. 667; The Alexandra, 104 Fed. 904. In Stein v. Bowman, 13 Pet. 209, 10 L. ed. 129, it was said that the only method by which depositions can be taken in a foreign country is by a commission, and in Cortes Co. v. Tannhauser, 21 Blatchf. 552, 18 Fed. 667, it is said the proper course is by commission, but where notice that oral examinations would be required in the case has been given, that the evidence may be so taken in a foreign country. Edison Electric Co. v. Westinghouse, C. K. Co. 138 Fed. 460, 461, following Bischoffsheim v. Baltzer, 20 Blatchf. 229, 10 Fed. 1.

Commissions to take evidence in a foreign country may issue under a *dedimus* pursuant to the provisions of U. S. Rev. Stat. sec. 866, U. S. Comp. Stat. 1901, p. 661. (Ibid.; United States v. 50 Boxes & Packages of Lace, 92 Fed. 602, 603); or by commission under equity rule 67, par. 1; or may be taken orally under equity rule 67, par. 2 (Bischoffsheim v. Baltzer, 20 Blatchf. 229, 10 Fed. 4. See Hollander v. Baiz, 40 Fed. 659, S. C. 43 Fed. 35); or under the forms provided by State statutes, (United States v. 50 Boxes & Packages of Lace, 92 Fed. 603, 604); or under "Letters Rogatory" (U. S. Rev. Stat. sec. 875).

*Before Whom Taken.*

We have already seen before what officials in foreign countries depositions may be taken under the State practice of Texas, but by section 1750 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1196, it is provided that depositions may be taken in foreign countries before any secretary of legation or consular officer within the limits of his legation, consulate, or commercial agency, and it is further provided that such officers may perform any notarial act which a notary public may perform in this country, and when the depositions are so taken and certified under the seal of office of such officer, they shall be as valid as if taken in the United States under the laws thereof. *Bischoffsheim v. Baltzer*, 20 Blatchf. 229, 10 Fed. 4; *Cortes Co. v. Tannhauser*, 21 Blatchf. 552, 18 Fed. 667.

*Letters Rogatory.*

By U. S. Rev. Stat. sec. 875, evidence may be taken in a foreign country, either by commission or letters rogatory, in any suit in which the *United States is a party*, or has an interest, and by sections 4071 to 4074, U. S. Comp. Stat. 1901, pp. 2763, 2764, it provided for taking the testimony of witnesses in this country upon letters rogatory addressed to any circuit court of the United States by any court of a foreign country. The circuit court to which the letters are addressed will designate a commissioner to take the testimony required, with all powers necessary to execute the commission.

In *Gross v. Palmer*, 105 Fed. 833, it is said that letters rogatory may issue from a circuit court where testimony cannot otherwise be obtained, but it must be shown with certainty that a commission is not adequate.

Letters rogatory are prepared in the name of the President of the United States and addressed to the presiding officer of some court of record of a foreign country, stating the pending of a suit in a court of the United States and suggesting certain parties (naming them) are within the jurisdiction of the foreign court and are material witnesses in the pending cause.

Then follows a request that by the usual process of the foreign court the

parties named be brought before the court, or some competent person appointed by the court, to be examined on the interrogatories and cross-interrogatories annexed to the letter; that the answers be taken in writing and returned, addressed to the clerk of the court where the cause is pending. They are to be sealed up with the letter rogatory and returned.

The teste to the letter rogatory should be:

Witness the . . . . ., Chief Justice of the United States, this . . . . . day of . . . . ., A. D. 19 . . . , and the . . . . . year of the independence of the United States of America.

Attest:

(SEAL.)

Clerk of the . . . . .

(Court in which suit is pending.)

If issued from a district court of the United States, it shall bear teste of the judge and attested by the clerk of the court as above.

When executed by the court or commissioner to whom directed, it must be returned to the minister or consul of the United States nearest to the place where executed, who is to indorse on it a certification when and where it was received, and the condition in which he received it, and he shall then transmit the letter on commission so executed and certified, to the clerk of the court from whence it issued.

## CHAPTER XC.

### SUPPRESSING DEPOSITIONS.

The requirements of the laws under which depositions are taken must be complied with (*Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174), and the certificate of the officer taking should show compliance as to the manner of taking, as already explained. Formerly the rulings were very strict because of the fact that under the 30th section of the act of 1789 they could be taken without notice, but now, notice being required, the rule may be stated as follows: If the right to take the deposition exists, and notice has been given, so that the opportunity for cross-examination has been secured, then the objection must be substantial to be sustained. *Kansas City, Ft. S. & M. R. Co. v. Stone*, 2 C. C. A. 437, 10 U. S. App. 209, 51 Fed. 656; *H. Scherer & Co. v. Everest*, 94 C. C. A. 346, 168 Fed. 822; *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288-290.

A motion to suppress evidence taken in rebuttal will not be granted if there is any evidence in rebuttal in the deposition. *West Pub. Co. v. Edward Thompson Co.* 152 Fed. 1019.

Subject to the above rule every step in the taking of depositions can be excepted to with a view to suppressing the depositions.

First. As to notice of taking.—While proper notice of taking as to time and place must be given, yet attending an examination waives all irregularities, and allowing the deposition to be read without objection at the trial, though a motion to suppress before the trial has been made and overruled, waives any objection to the manner of taking. *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 291; *Ray v. Smith*, 17 Wall. 411, 21 L. ed. 666. In *Gartside Coal Co. v. Maxwell*, 20 Fed. 187, it is said that depositions will not be suppressed though taken at a different place from the one

named in the notice, if both parties are present when taken. *Bird v. Halsy*, 87 Fed. 672; *Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 732; *Brown v. Ellis*, 103 Fed. 837; *Gormley v. Bunyan*, 138 U. S. 632, 34 L. ed. 1089, 11 Sup. Ct. Rep. 453.

### *Reasonable Notice.*

What constitutes reasonable notice in point of time depends on the circumstances in each case. *American Exch. Nat. Bank v. First Nat. Bank*, 27 C. C. A. 274, 48 U. S. App. 633, 82 Fed. 961; *The Serapis*, 49 Fed. 393; *Uhle v. Burnham*, 44 Fed. 729.

Second. When defect in commission.—If there be a defect in the commission, the courts have permitted it to be amended. Thus, where the commission was addressed to one Carey, instead of Corey, it was held a clerical mistake, and did not mislead the defendant, as he had been notified of the name of the commissioner in the notice for taking. *Bibb v. Allen*, 149 U. S. 488, 37 L. ed. 822, 13 Sup. Ct. Rep. 950; *Brown v. Ellis*, 103 Fed. 836; *United States v. Pings*, 4 Fed. 714. So in *United States v. Pings*, 4 Fed. 714, it was held that a commission properly executed would not be set aside, though the instructions accompanying it were not signed by the clerk or counsel, as required by a rule of court issuing the commission. The failure to note an objection to a deposition based on the form of a commission, or the manner of executing it when the deposition is taken, or to present the objection by a motion to suppress before the trial begins, is a waiver of the objection. *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500.

### *When Defectively Taken.*

If the depositions are defectively taken, a motion to suppress must be made at once, or it will waive the objection to form and manner of taking. *Samuel Bros. v. Hostetter Co.* 55 C. C. A. 111, 118 Fed. 257; *Stegner v. Blake*, 36 Fed. 184. Thus, where the commissioner attached copies of exhibits, instead of the originals, and marked them for identification,

without saying he had compared them, the objection must be met by motion to suppress before the hearing, or it is waived. The Holladay Case, 27 Fed. 842; Insurance Co. of N. A. v. Guardiola, 129 U. S. 643, 32 L. ed. 803, 9 Sup. Ct. Rep. 425. Blackburn v. Crawford, 3 Wall. 191, 192, 18 L. ed. 192, 193. So a motion to suppress because defectively taken, filed one month after cause is set for hearing, comes too late. Ibid. Setting the cause for hearing waives technical objections. The Holladay Case, 27 Fed. 842, 843, and cases cited. Blackburn v. Crawford, 3 Wall. 191, 192, 18 L. ed. 192, 193.

Where cross interrogatories were not answered, the deposition will not be suppressed if the motion comes too late to retake them. Rahtjen's American Composition Co. v. Holzapfel's Compositions Co. 97 Fed. 949. So when defectively taken, objections are waived if allowed to be used. Indianapolis Water Co. v. American Straw-Board Co. 65 Fed. 534; Union P. R. Co. v. Reese, 5 C. C. A. 510, 15 U. S. App. 92, 56 Fed. 288; Ray v. Smith, 17 Wall. 417, 21 L. ed. 669, or counsel present when taken, Brown v. Ellis, 103 Fed. 834, and not excepting.

When the brother of the attorney took the depositions, it was held that the depositions could be read. And where the attorney wrote the answers, while irregular, yet no fraud being shown, the court would not suppress. Missouri, K. & T. R. Co. v. Byas, 9 Tex. Civ. App. 572, 29 S. W. 1122. However, it was intimated otherwise in Dawson v. Poston, 28 Fed. 606; United States v. Pings, 4 Fed. 714.

#### *Witness Adopting Previous Answers.*

A witness on his second examination read over a copy of his testimony given previously and subscribed it as his deposition. This was held not to render the deposition inadmissible. Samuel Bros v. Hostetter Co. 55 C. C. A. 111, 118 Fed. 257.

#### *Defective Certificate.*

(See chapter 35.)

A commissioner taking depositions in a foreign country, who fails to certify that the examination was "subscribed by

the sworn interpreter," as directed, is immaterial if the certificate shows the interpreter was sworn. *United States v. 50 Boxes & Packages of Lace*, 92 Fed. 601.

Where the notary certifies that he is not attorney for either party, omission to certify that he is not interested in the event of suit is not sufficient cause to suppress. *Stewart v. Townsend*, 41 Fed. 121. See also *Giles v. Paxson*, 36 Fed. 882. In *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 248, where the name of the witness was not rightly given, but there was no doubt from the record who was intended, the deposition was not suppressed.

In *Stegner v. Blake*, 36 Fed. 184, the defect in the certificate was a want of a statement of the cause of taking. Such defect was waived because not taken before final hearing. *Bird v. Halsy*, 87 Fed. 672.

In *Brown v. Ellis*, 103 Fed. 834, it is held that depositions for use in the Federal Court under U. S. Rev. Stat. sec. 863-865, U. S. Comp. Stat. 1901, pp. 661-663, and under a commission to a notary public, his official seal to the certificate is not essential.

Again, where a commission issued to A. C. Strong, the depositions are not inadmissible because certified by Alfred C. Strong. *Ibid*.

See *Columbus R. Co. v. Patterson*, 73 C. C. A. 603, 143 Fed. 245. (See "Informality of Certificate.")

### *Will Be Suppressed.*

When taken after the time allowed. *Re Thomas*, 35 Fed. 337. When a witness is re-examined before an examiner on the same matter without an order of court. *Thurber v. Cecil Nat. Bank*, 52 Fed. 515. So when taken by a party before he becomes party to the suit. *Riviere v. Wilkens*, 31 Tex. Civ. App. 454, 72 S. W. 608.

So where a party declines to introduce his witness for cross-examination, the direct examination will be suppressed. So when answers taken stenographically, and not reduced to writ-

ing in the presence of the witness, or read over to him. *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 491; *Cook v. Burnley*, 11 Wall. 668, 20 L. ed. 30. But see *Bird v. Halsy*, 87 Fed. 677, not applying rule to depositions taken in a foreign country. So when witness refuses to answer a material question. *Bird v. Halsy*, 87 Fed. 674. But not where no effort is made to make him answer, and no notice of intention to suppress, and two terms intervene before a motion to suppress is made. *Ibid.* But it seems exception must be noted before examiner. *Ibid.* *Doane v. Glenn*, 21 Wall. 35, 22 L. ed. 476; *McClaskey v. Barr*, 48 Fed. 138. While you can not prevent a party from taking irrelevant testimony, yet they will be suppressed if none of the answers are relevant. *Griffith v. Shaw*, 89 Fed. 313; *First Nat. Bank v. Rush*, 29 C. C. A. 333, 56 U. S. App. 556, 85 Fed. 541.

### *Motion to Suppress.*

As before seen, in stating the cause for suppressing depositions, the motion must be made before the case is called for trial at law. *Bibb v. Allen*, 149 U. S. 481, 37 L. ed. 819, 13 Sup. Ct. Rep. 950; *Bird v. Halsy*, 87 Fed. 672; *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; *Stegner v. Blake*, 36 Fed. 184. There must be given an opportunity to correct the deposition, or the defects in taking, to which objections have been made. *Ibid.*; *Doane v. Glenn*, 21 Wall. 35, 22 L. ed. 476; *McClaskey v. Barr*, 48 Fed. 138; *The Holladay Case*, 27 Fed. 842; *New York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 113, 114, 18 L. ed. 172; *Shutte v. Thompson*, 15 Wall. 160, 21 L. ed. 126; *Samuel Bros. v. Hostetter Co.* 55 C. C. A. 111, 118 Fed. 257. This rule, it is said, may be relaxed when returned just before trial. *New York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107-114, 18 L. ed. 170-172.

In equity all technical objections must be presented by motion before the case is set for hearing. (Authorities above.) Where the evidence is irrelevant, or other substantial objection exists, as being hearsay, secondary, or irresponsive, it may be taken when evidence is offered at the hearing, and not by motion to suppress. *First Nat. Bank v. Rush*, 29 C. C. A. 333,



56 U. S. App. 556, 85 Fed. 542; Lott v. King, 79 Tex. 293, 15 S. W. 231. When a motion to suppress is necessary, it is only necessary to state specifically the grounds upon which it is based, and a prayer to suppress, and to be filed, as indicated above, in such time that opportunity for curing the defect may be given.

### *Effect of Death On.*

A deposition of a party as to transactions with another party, taken while the latter is alive, may be used when the suit is revived in the name of his representatives. Sheidley v. Aultman, 18 Fed. 666; McMullen v. Ritchie, 64 Fed. 253, 266; See Ruch v. Rock Island, 97 U. S. 694, 24 L. ed. 1101; United States L. Ins. Co. v. Ross, 42 C. C. A. 601, 102 Fed. 722. And this, too, though the party with whom the transaction was had dies before his evidence was taken. Ibid. As to offering testimony of deceased witness at law see Nome Beach Lighterage & Transp. Co. v. Standard M. Ins. Co. 156 Fed. 484, 485, and cases cited.

### *When Destroyed.*

When the depositions are destroyed by fire or other accident, copies may be used, though the witness be living. U. S. Rev. Stat. secs. 899, 900, U. S. Comp. Stat. 1901, p. 675. Stebbins v. Duncan, 108 U. S. 46, 27 L. ed. 646, 2 Sup. Ct. Rep. 313. See Ruch v. Rock Island, 97 Fed. 693, 124 L. ed. 1101, as to reproducing the evidence of deceased witness.

### *Evidence in a Former Case.*

Evidence taken in a former case is only secondary and is incompetent unless a foundation is laid, as, that the witnesses are dead or unavoidably absent. Ecaubert v. Appleton, 15 C. C. A. 73, 35 U. S. App. 221, 67 Fed. 917; Dover v. Greenwood, 177 Fed. 947; Diamond Coal & Coke Co. v. Allen, 71 C. C. A. 107, 137 Fed. 706; Toledo Traction Co. v. Cameron, 69 C. C. A. 28, 137 Fed. 49.

## CHAPTER XCI.

### DEPOSITIONS ON LAW SIDE.

Before closing the discussion of depositions, I wish to briefly speak of depositions *de bene esse* taken in a cause at law in the Federal courts. We have seen that sec. 863, United States Revised Statutes, U. S. Comp. Stat. 1901, p. 661, provides for taking depositions when the witness lives at a greater distance than one hundred miles from the place of trial, or is bound on a sea voyage, or about to go out of the United States, or when aged and infirm, or when a single witness to a material fact. *Bird v. Halsy*, 87 Fed. 676, 677; *Lowrey v. Kusworm*, 66 Fed. 539; see *Frost v. Barber*, 173 Fed. 847; *Zych v. American Car & Foundry Co.* 127 Fed. 724. We have seen that this statute applies in equity as well as law, (*Stegner v. Blake*, 36 Fed. 184), but that in its application in equity the provisions other than the clause referring to the distance of the witness from the place of trial were the grounds for taking the depositions in equity *before* issue joined only.

At law, unless one or more of these conditions exist, you cannot take the evidence of a witness *by deposition* in the United States courts, but must have him at the trial, to be examined orally. *Ibid.*; *Diamond Coal & Coke Co. v. Allen*, 71 C. C. A. 107, 137 Fed. 705, 706; *Compania Azucarera Cubana v. Ingraham*, 180 Fed. 516; *National Cash Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 957, 958; *Henning v.*

Boyle, 112 Fed. 397; Hartman v. Feenaughty, 139 Fed. 888; Importers' & T. Nat. Bank v. Lyons, 134 Fed. 510, 511. But it seems the rule does not apply when depositions are taken in answer to a rule to show cause where facts disputed. Importers' & T. Nat. Bank v. Lyons, 134 Fed. 512.

In 1892, as before stated, Congress permitted depositions to be taken in the mode prescribed by the State laws and practice, but, as we have before seen, this merely simplified the practice without enlarging the conditions under which depositions could be taken in the Federal courts. Texas & P. R. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. 957; National Cash Register Co. v. Leland, 37 C. C. A. 372, 94 Fed. 502, S. C. 77 Fed. 242; Despeaux v. Pennsylvania R. Co. 81 Fed. 897. This act of 1892 has been frequently construed, and, without further discussion, I will give the rules that have been evolved, which control the practice on the law side of the Federal courts in taking the testimony of witnesses by deposition.

First. The State statutes do not affect the causes or grounds for taking depositions on the law side. United States v. 50 Boxes & Packages of Lace, 92 Fed. 601.

Second. That depositions taken from a witness living within one hundred miles from the place of trial cannot be read in evidence, and the distance is to be determined by taking the ordinary, usual, and shortest route of public travel (Jennings v. Menaugh, 118 Fed. 612; see authorities above; Mutual Ben. L. Ins. Co. v. Robison, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 732; Texas & P. R. Co. v. Reagan, 55 C. C. A. 427, 118 Fed. 817; Whitford v. Clark County, 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306), unless the witness was aged and infirm, or the ground for taking came under the other conditions of sec. 863, United States Revised Statutes.

Third. That the act of 1892 did not change this rule. Shellabarger v. Oliver, 64 Fed. 306; Seeley v. Kansas City Star Co. 71 Fed. 555; National Cash Register Co. v. Leland, 77 Fed. 242.

Fourth. That even where the depositions have been taken,

in a State court, of a witness who lives within one hundred miles of the place of trial, they cannot be read in the Federal court when the case has been removed thereto, if the suit be at law (*Ibid.*; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958; *Toledo Traction Co. v. Cameron*, 69 C. C. A. 28, 137 Fed. 59), unless the witness was dead when offered. (*United States L. Ins. Co. v. Ross*, 42 C. C. A. 601, 102 Fed. 722; *Toledo Traction Co. v. Cameron*, *supra*).

The words "must live a greater distance than one hundred miles" has been construed to mean that when the deposition was taken, where the witness was at the time found sojourning, or abiding for his health, was the point to which the distance was calculated, in order to determine its admission (*Mutual Ben. L. Ins. Co. v. Robison*, 22 L.R.A. 325, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 724), and it seems courts will take judicial notice of the distance. (*Ibid.* 732).

Fifth. It cannot be taken before trial, but orally in court. *Importers' & T. Nat. Bank v. Lyons*, 134 Fed. 511.

Sixth. Though deposition taken, it cannot be read if the witness is in court. U. S. Rev. Stat. sec. 865, U. S. Comp. Stat. 1901, p. 663; *Whitford v. Clark County*, 119 U. S. 524, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 958. But this rule not applicable to depositions taken under a *dedimus*. *Ibid.*

### *Special Federal Statutes Controlling Evidence.*

I will here add without discussion reference to certain special statutes affecting the admission of record evidence in the trial of civil causes in the Federal courts.

U. S. Rev. Stat. secs. 883 to 896, U. S. Comp. Stat. 1901, pp. 669, 674, provide for the admission of copies of all documents from the various departments of the government. *United States v. Brelin*, 92 C. C. A. 88, 166 Fed. 104.

Sections 899 to 901 provide for restoring lost judgments and records of the Federal courts and their admission as evidence. *Cornett v. Williams* (*Nash v. Williams*) 20 Wall. 226, 22 L. ed. 254; *O'Hara v. Mobile & O. R. Co.* 22 C. C. A. 512, 40 U. S. App. 471, 76 Fed. 718; *Union & Planters' Bank v.*

Memphis, 49 C. C. A. 455, 111 Fed. 561; Embry v. Palmer, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

Section 905 provides for the admission in evidence of acts of the State legislation, also the records and judicial proceedings of the courts of States and Territories, and how they are to be authenticated or proved. Israel v. Israel, 130 Fed. 237; Bohlander v. Heikes, 94 C. C. A. 298, 168 Fed. 886; National Acci. Soc. v. Spiro, 37 C. C. A. 388, 94 Fed. 750.

Section 906 provides for the admission of all records, and exemplification of books, which may be kept in any public office of any State or Territory not appertaining to a court. Williams v. United States, 137 U. S. 113, 34 L. ed. 590, 11 Sup. Ct. Rep. 43.

Section 907 provides for the admission of copies of foreign records relating to land titles in the United States.

Section 908 provides that the publication of the laws and treaties of the United States by Little, Brown & Co. shall be competent evidence of the public and private acts of Congress and of the treaties therein contained, in all courts of law and equity of the United States and the several States without further proof.

### *Who May Use the Deposition.*

One may use any part of a deposition taken by the other side. H. Scherer & Co. v. Everest, 94 C. C. A. 346, 168 Fed. 827, and cases cited.

### *Cost Allowed in Taking and Reading.*

See equity rule 25; U. S. Rev. Stat. sec. 824, U. S. Comp. Stat. 1901, p. 632; Matheson v. Hanna-Schoelkopf Co. 128 Fed. 163; L. E. Waterman Co. v. Lockwood, 128 Fed. 174; United States use of Hudson River Stone Supply Co. v. Venable Const. Co. 158 Fed. 833; Kissinger-Iron Co. v. Bradford Belting Co. 59 C. C. A. 221, 123 Fed. 91; Missouri v. Illinois, 202 U. S. 598, 50 L. ed. 1160, 26 Sup. Ct. Rep. 713; Ingham v. Pierce, 37 Fed. 647; Broyles v. Buck, 37 Fed. 137.

## CHAPTER XCII.

### DISMISSAL BY THE COURT.

Having brought the cause up to the point of final hearing, I will again call your attention to the fact that it is the duty of the court to guard against imposition upon its jurisdiction, and to dismiss the cause whenever it appears from the record that its jurisdiction has been imposed upon. Section 5 of the act of 1875, 18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508, provides that *at any time* after filing a suit in the United States court, it should appear that such suit does not *substantially involve a suit or controversy properly within the jurisdiction of the court*, or that parties have been collusively or improperly joined in order to make a case cognizable in the Federal court, the court shall proceed no further, but shall *dismiss the case*. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 287, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; *Pennsylvania Co. v. Bay*, 138 Fed. 205 and cases cited. *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 647.

It is seen by this act that it is a duty devolving upon the court without reference to the action of counsel, to dismiss the case if it comes within the condemnation of the act, and does not substantially involve a controversy properly within the jurisdiction of the court, and this duty is mandatory, when the conditions authorizing a dismissal are apparent, or developed by the facts in the trial of the case. *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727; *Farmington v. Pillsbury*, 114 U. S. 144, 29 L. ed. 116, 5 Sup. Ct. Rep. 807; *Briggs v. Traders' Co.* 145 Fed. 254; *Koike v. Atchison, T. & S. F. R. Co.* 157 Fed. 623; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992; *Minnesota v. Northern Securities Co.* 194 U. S. 65, 66, 48 L. ed. 878, 879, 24 Sup. Ct. Rep. 598; *Steigleder v. McQuesten*, 198 U. S. 141, 49 L. ed. 986, 25 Sup. Ct. Rep. 616; *Wetmore v.*

Rymer, 169 U. S. 120, 42 L. ed. 684, 18 Sup. Ct. Rep. 293; see *Howe v. Howe & O. Ball Bearing Co.* 154 Fed. 822, and cases cited. The provision is a salutary one (*Williams v. Not-tawa*, 104 U. S. 212, 26 L. ed. 720), and evidently intended to confine the Federal courts within the limits of the jurisdiction as enlarged by the jurisdictional and removal act of 1875. *Simon v. House*, 46 Fed. 319; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521.

Under section 5 of the act of 1875, 18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508, the court will, of its own motion, dismiss a case where the jurisdictional ground is not apparent in the bill. *Carlsbad v. Tibbetts*, 51 Fed. 852; *Tinsley v. Hoot*, 3 C. C. A. 612, 2 U. S. App. 548, 53 Fed. 682; *King Bridge Co. v. Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552; *Metcalf v. Watertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Hartog v. Memory*, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; *Morris v. Gilmer*, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 647; *Anderson v. Bassman*, 140 Fed. 12, 13. (See chapter 35.) But I wish briefly, but more particularly, to discuss the dismissal of the suit by the court when the evidence taken in the case develops the absence of jurisdiction.

Prior to 1875, as has been before stated, when the jurisdictional fact was properly alleged, though untrue, it could only be attacked by plea, and a plea to the merits waived it. *Jones v. League*, 18 How. 81, 15 L. ed. 264; *Hartog v. Memory*, 116 U. S. 590, 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521. But since the statute, a plea is not absolutely necessary to dismiss if during the progress of the cause, or at the final hearing, the want of jurisdiction is made apparent; the court is required to dismiss without any suggestion of counsel.

But the question arises, how and to what extent it must be made apparent that there is a want of jurisdiction, in order to invoke the action of the court, when there is no plea, or the issue not raised. The rule seems to be that the facts upon which the court will act must amount to a *legal certainty*; that a mere impression, though it may amount to a moral certainty that the jurisdiction has been imposed upon, will not be sufficient to require the court to dismiss the case under the act,

and it is held that this is the true interpretation of the words of the fifth section, "that it should appear to the satisfaction of the court." *Ibid.*; *Barry v. Edmunds*, 116 U. S. 559, 29 L. ed. 732, 6 Sup. Ct. Rep. 501; *Gubbins v. Laughtenschlager*, 75 Fed. 621; *Howe v. Howe & O. Ball Bearing Co.* 83 C. C. A. 536, 154 Fed. 820; *Holden v. Utah & M. Machinery Co.* 82 Fed. 210; *Hayward v. Nordeberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 6-10; *Deputron v. Young*, 134 U. S. 252, 33 L. ed. 929, 10 Sup. Ct. Rep. 539. It may be made apparent by affidavit; no distinct method stated. *Morris v. Gilmer*, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289; *Anderson v. Bassman*, 140 Fed. 13.

Then it may be said that the provisions of section 5 do not avoid, unless there appears from the evidence a *legal certainty* that the jurisdiction has been imposed upon. But this would not be the rule, if you pleaded to the jurisdiction; only the preponderance of proof, or the *reasonable certainty*, would be sufficient to support a dismissal of the cause under a plea. *Ibid.*; in *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725, 6 Sup. Ct. Rep. 521, it is said that to attack the jurisdiction by evidence, you must plead it (*Marine & River Phosphate Min. & Mfg. Co. v. Bradley*, 105 U. S. 181, 26 L. ed. 1036, and *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539). It is said, if the jurisdictional allegation is not traversed, no question involving the capacity of the party to sue can be made. *Kennedy v. Solar Ref. Co.* 69 Fed. 717; see *Hewitt v. Story*, 39 Fed. 160, 161. In the light of the fifth section of the act of 1875, these cases must mean that if you do not plead to the jurisdiction, you cannot offer any direct evidence showing a want of jurisdiction, and that the proof to create the legal certainty upon which the court can act must clearly appear from the evidence legitimately drawn out on the other material issues in the case. *Ibid.*

To illustrate, we will assume that the case rests upon diversity of citizenship for jurisdiction, which is properly, but not truly, alleged; no plea is interposed, but perhaps the question may be directly asked as to the citizenship of a party; there being no issue, the answer could not be used upon which to base the dismissal, but should the same fact be developed



in the answers to questions on material issues in the case, then it would be sufficient to sustain a dismissal of the cause.

### *Parties.*

The court may dismiss of its own motion when it appears that an indispensable party has not been joined, and when the joinder would defeat jurisdiction. *Fourth Nat. Bank v. New Orleans & C. R. Co.* 11 Wall. 631, 20 L. ed. 83; *Taylor v. Holmes*, 14 Fed. 515; *Shields v. Barrow*, 17 How. 139, 15 L. ed. 160. Or where indispensable parties cannot be served. *Jones v. Gould*, 80 C. C. A. 1, 149 Fed. 159, and cases cited. Or the court may dismiss at the hearing for want of parties, where the objection has been made at the beginning of the suit, and the plaintiff has failed to set it down for hearing on the objection, and it appeared at the trial the objection was well taken. Equity rule 52; *Olds Wagon Works v. Benedict*, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 5; See *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 382-384, 28 L. ed. 463, 464, 4 Sup. Ct. Rep. 510.

So the court will dismiss a bill when it appears that pending the suit the plaintiff has parted with his title, and no bill in the nature of a supplemental bill has been filed. *Campbell v. New York*, 35 Fed. 14; *Hazleton Tripod-Boiler Co. v. Citizens' Street R. Co.* 72 Fed. 325; *Brown v. Fletcher*, 140 Fed. 639; *Miller v. Wattier*, 165 Fed. 362. But the dismissal should be without prejudice (*Kendig v. Dean*, 97 U. S. 423, 24 L. ed. 1061), because a general dismissal would create the presumption that it was on the merits. *Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 964; see *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111.

### *Want of Equity.*

If on the trial the case shows that there is no equity in the bill, and the jurisdiction of the court was not sought in *good faith*, the court will of its own motion dismiss the bill (*Fougeres v. Jones*, 66 Fed. 316; *Mitchell v. Dowell*, 13 Fed. 141, S. Eq.—37).

s. c. 105 U. S. 432, 26 L. ed. 1143; *Cherokee Nation v. Southern Kansas R. Co.* 33 Fed. 915; *Alger v. Anderson*, 92 Fed. 710; *Thompson v. Central Ohio R. Co.* 6 Wall. 137, 18 L. ed. 767; *Kramer v. Cohn*, 119 U. S. 357, 30 L. ed. 440, 7 Sup. Ct. Rep. 277; see "Adequate Remedy at Law"), but without prejudice to a suit at law. (*Sanders v. Devereux*, 8 C. C. A. 629, 19 U. S. App. 630, 60 Fed. 311). So where no real dispute remains, the court may dismiss. *Allen v. Georgia*, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Lewis Pub. Co. v. Wyman*, 182 Fed. 14; see *Robinson v. American Car & Foundry Co.* 132 Fed. 166.

*When Collusively Obtained.*

The fifth section of the act of 1875 says the court must guard itself against fraudulent collusion to obtain jurisdiction. This means combination of any kind by which jurisdiction is obtained fraudulently (*Coffin v. Haggin*, 7 Sawy. 509, 11 Fed. 224); and when the evidence discloses the fact (*Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 342, 40 L. ed. 450, 16 Sup. Ct. Rep. 307; *Cilley v. Patten*, 62 Fed. 500; *Hayden v. Manning*, 106 U. S. 588, 27 L. ed. 306, 1 Sup. Ct. Rep. 617; *Marvin v. Ellis*, 9 Fed. 367); or where the ground for jurisdiction sought is frivolous or fictitious (*Douglas v. Wallace*, 161 U. S. 348, 40 L. ed. 728, 16 Sup. Ct. Rep. 485; *Hamblin v. Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; see *Re Metropolitan R. Receivership [Re Reisenberg]* 208 U. S. 91, 52 L. ed. 403, 28 Sup. Ct. Rep. 219, and *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Pennsylvania Steel Co. v. New York City R. Co.* 157 Fed. 441). Thus, collusive assignments will be ground for dismissal (*Farmington v. Pillsbury*, 114 U. S. 144-146, 29 L. ed. 116, 117, 5 Sup. Ct. Rep. 807; *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 656; *McLean v. Clark*, 31 Fed. 501, 502; *Norton v. European & N. A. R. Co.* 32 Fed. 865; *Detroit v. Dean*, 106 U. S. 541, 27 L. ed. 302, 1 Sup. Ct. Rep. 500; *Turnbull v. Ross*, 72 C. C. A. 609, 141 Fed. 649-652 and cases cited. *Slaughter v. Mallet Land &*

Cattle Co. 72 C. C. A. 430, 141 Fed. 282; Lake County v. Dudley, 173 U. S. 253, 43 L. ed. 688, 19 Sup. Ct. Rep. 398, and cases cited. Greenwalt v. Tucker, 10 Fed. 884; Coffin v. Haggin, 7 Sawy. 509, 11 Fed. 219; Fountain v. Angelica, 12 Fed. 8); or fraudulent making of parties; or when the case is dishonestly brought to force a compromise which develops in the evidence (Ibid.) it is the duty of the court to exercise the power (Simon v. House, 46 Fed. 319; Williams v. Nottawa, 104 U. S. 212, 213, 26 L. ed. 720, 721; Hartog v. Memory, 116 U. S. 590, 29 L. ed. 726, 6 Sup. Ct. Rep. 521); and if the court should suspect the conditions as stated above to exist, it should institute proceedings of its own motion to discover it (Hartog v. Memory, 116 U. S. 591, 29 L. ed. 726, 6 Sup. Ct. Rep. 521; Morris v. Gilmer, 129 U. S. 327, 32 L. ed. 694, 9 Sup. Ct. Rep. 289); but collusive arrangements will not be inferred. (Ashley v. Presque Isle County, 8 C. C. A. 455, 16 U. S. App. 656, 709, 60 Fed. 55, 56; Mills v. Chicago, 143 Fed. 431, 432).

### *Effect of Dismissal.*

A dismissal of a case ordinarily stands on the same footing as a judgment at law, and will be presumed to be final and conclusive unless the contrary appears in the proceedings or decree of the court. Graves v. Faurot, 64 Fed. 242; Stewart v. Ashtabula, 98 Fed. 518, 519; Durant v. Essex Co. 7 Wall. 109, 19 L. ed. 156; Kilham v. Wilson, 50 C. C. A. 454, 112 Fed. 573; Fowler v. Osgood, 4 L.R.A.(N.S.) 824, 72 C. C. A. 276, 141 Fed. 24. So in all these cases when the objection does not go to the merits of the case the judgment of dismissal should always be "without prejudice." Baker v. Cummings, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; American Surety Co. v. Choctaw Constr. Co. 68 C. C. A. 199, 135 Fed. 487; Greene v. United Shoe Machinery Co. 60 C. C. A. 93, 124 Fed. 964; Sanders v. Devereux, 8 C. C. A. 629, 19 U. S. App. 630, 60 Fed. 311; Swan Land & Cattle Co. v. Frank, 148 U. S. 612, 37 L. ed. 580, 13 Sup. Ct. Rep. 691; Security Sav. & L. Asso. v. Buchanan, 14 C. C. A. 97, 31 U. S. App. 244, 66 Fed. 803; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. 30

C. C. A. 632, 58 U. S. App. 83, 87 Fed. 255. As to the effect of a judgment "without prejudice," see *Robinson v. American Car & Foundry Co.* 142 Fed. 171.

In determining the effect of the dismissal the opinion may be looked to for ground of dismissal. *Baker v. Cummings*, 181 U. S. 125, 45 L. ed. 780, 21 Sup. Ct. Rep. 578; see *National Foundry & Pipe Works v. Oconto Water Supply Co.* 183 U. S. 234, 46 L. ed. 169, 22 Sup. Ct. Rep. 111; *United States ex rel. Coffman v. Norfolk & W. R. Co.* 114 Fed. 686. However, when a suit is dismissed by the court for want of prosecution it is not a bar to another suit (*Whitaker v. Davis*, 91 Fed. 721; *Robinson v. American Car & Foundry Co.* 142 Fed. 171); nor when dismissed for failure to observe a rule of court. (*Ryan v. Seaboard R. R. Co.* 89 Fed. 397).

### *Costs on Dismissal.*

When a bill is dismissed for want of jurisdiction the court cannot decree costs. *Citizens' Bank v. Cannon*, 164 U. S. 324, 41 L. ed. 453, 17 Sup. Ct. Rep. 89; see *Rucker v. Wheeler*, 127 U. S. 92, 32 L. ed. 105, 8 Sup. Ct. Rep. 1142; *Hornthall v. The Collector* (*Hornthall v. Keary*) 9 Wall. 566, 567, 19 L. ed. 562.

## CHAPTER XCIII.

### FINAL HEARING.

The evidence having been taken, or the time therefor having elapsed, the cause is ready for final disposition, unless further time has been given to take the evidence. "Final hearing" is submitting the case on its merits, or on some question the determination of which will finally dispose of the case. *Baron v. The Mt. Eden*, 87 Fed. 483, 484.

#### *Setting Down for Hearing.*

The final hearing must be in open court, and it may be set down for hearing by either party; or you may, by consent, get a day with the permission of the court during the term to hear the cause. If consent cannot be obtained, then notify counsel as follows:

Title as in bill.

To A. B., Solicitor, etc.:

You will please take notice that the above cause has been set down for final hearing upon the pleading, evidence and proceedings had thereon, before the judges of the Circuit Court of the United States for the ..... District of ....., at the next term of the court to be held in the city of ..... on the ..... day of ....., A. D. 19.., and on the first day of said term, or as soon thereafter as practicable.

The clerk, on request, will place the case on the docket to be heard, and you are then in a position to call up the case on any day during the term that the court may set or consents to hear it. Ordinarily the practice is to set the chancery docket for hearing after the jury has been discharged for the term.

But it is not always necessary to await the session of the court in the division of the judicial district in which the suit is brought, for by *consent* of parties, the application for, and the final hearing, may be had wherever the judge may be hold-

ing court in his district, and the recital in the decree that the cause was heard in the district is conclusive on all parties who participate in the hearing. The decree thus made should by order be transmitted to the local division in which the suit is pending to be entered of record as if the cause had been heard there. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 174.

### *Preparation for Hearing.*

In preparing a case for hearing it is the duty of counsel, especially where the evidence is voluminous and the issues complicated, to prepare an abstract of the issues and evidence in logical and lucid form. The propositions to be submitted, followed by a plain statement of the evidence in the record supporting it, should be made to avoid the necessity of having to wade through much chaff to find the wheat, thus facilitating the hearing and relieving the court from unnecessary labor.

Judge Shiras, in his excellent little manual of Equity Practice, says: "There is no other step in the preparation and submission of a cause in which care, discrimination, and thoroughness on the part of counsel are of greater moment than in preparing this abstract."

The cause is then heard in the usual manner by the plaintiff stating his case and offering his proof. The defendant then states his defense, and his cross bill, if he has filed one, and offers his proof. The plaintiff may then state his defense to the cross bill, and offer his proof, and then rebutting testimony, if any, may be offered in either case. The court generally permits the plaintiff to state his case and his views of the issues, and then the defendant states his view of the issues, and after that to offer the evidence in order.

### *Effect on Previous Orders.*

At the hearing all previous orders made in the case are subject to revision, though such changes are seldom made, but affidavits taken before the cause was at issue cannot be used in evidence in the final hearing. *Lilienthal v. Washburn*, 4 Woods, 65, 8 Fed. 707. (See chapter 71.)

## CHAPTER XCIV.

### MASTERS IN CHANCERY.

By equity rule 82 the circuit courts of the United States may appoint standing masters in chancery in their respective districts, or special masters *pro hac vice* in any particular case. This rule was amended in 1894 as to the manner of appointment of standing masters only. By act of March 3, 1879, 20 Stat. at L. 415, chap. 179, no clerk of the United States courts, or their deputies, shall be appointed a master in any case, except special reasons shall exist therefor, which are to be assigned in the order of appointment. *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 224.

#### *Nature of the Office.*

The master is a judicial officer representing the court in the matter referred to him. *Bate Refrigerating Co. v. Gillette*, 28 Fed. 673. *Dowagiac Mfg. Co. v. Lochven*, 74 C. C. A. 341, 143 Fed. 213, 6 A. & E. Ann. Cas. 573. He derives his powers from the appointment and the rules of equity prescribing his duties, as will be hereinafter set forth, and he need not give bond, nor does the validity of an order appointing him depend on showing an order in the records. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 494.

#### *Who to Be Appointed.*

We have seen above that neither clerks or their deputies can be appointed, except under special circumstances, nor should one be appointed having an interest in or a relationship to the parties to the suit, but, beyond this, anyone learned in the law, or supposed to be, may be appointed master, and the appoint-

ment should be made with reference to his fitness to perform the duties. *Hoe v. Scott*, 87 Fed. 220; *Shipman v. Straitsville Cent. Min. Co.* 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886; *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525; *Re Thomas*, 35 Fed. 337, 338.

### *Object and Effect of the Appointment.*

The purpose of the appointment of a master in a case is to economize the time of the court (*Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 704; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 290, 38 L. ed. 165, 14 Sup. Ct. Rep. 343), by assisting in the various proceedings incidental to the progress of the cause (*Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355). The appointment is purely discretionary with the court (*Brown v. Grove*, 25 C. C. A. 644, 42 U. S. App. 508, 80 Fed. 564), and when made is impervious to a collateral attack for ineligibility. (*Elgutter v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 218, 58 U. S. App. 643, 86 Fed. 500).

### *When Reference to a Master May Be Made.*

We have already seen that a bill or answer may be referred to a master, standing or special, to expunge all scandalous or impertinent matter (equity rule 26); but after the cause is ready for taking testimony, you may by consent, or on motion by one of the parties, have the case, with all the proceedings thereon, referred to a master to take the evidence and report the same, or his conclusions thereon, or refer both fact and law to report his judgment thereon. The court cannot, without the consent of all parties, refer the decision of the entire case to a master, for the court cannot abdicate its duty to determine the controversy by its own judgment. *Kimberly v. Arms*, 129 U. S. 512-530, 32 L. ed. 764-771, 9 Sup. Ct. Rep. 355; *Garinger v. Palmer*, 61 C. C. A. 436, 126 Fed. 910, 911; *Cleveland v. United States*, 62 C. C. A. 393, 127 Fed. 670. The court, however, may, when necessary to a proper or complete decree, refer on its own motion, or at the request



of either party, any special matter arising in a case. Thus it may after issue joined refer the issues, or it may, during or after the hearing, refer any issue in the cause to a special or standing master to report upon the same as directed in its order. *Brown v. Grove*, 25 C. C. A. 644, 42 U. S. App. 508, 80 Fed. 566; *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 225.

It may refer any matter of pleading (*Willis v. Terry*, 98 Fed. 9), account, or computation, or any fact or facts, fixing the priority of liens, or any other matter incident to the cause about which the court deems it necessary to be advised before determining and entering the decree. *Briggs v. Neal*, 56 C. C. A. 572, 120 Fed. 225; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882; *Hatch v. Indianapolis & S. R. Co.* 11 Biss. 138, 9 Fed. 856; *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68; See *Columbian Equipment Co. v. Mercantile Trust & D. Co.* 113 Fed. 23; *Gunn v. Brinkley Car Works & Mfg. Co.* 13 C. C. A. 529, 27 U. S. App. 779, 66 Fed. 383; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 295, 296.

### *Form of Reference.*

If the court should deem it necessary to send to a master any matter to be determined, you can prepare the reference as follows:

Title as in bill.

This cause coming on to be heard on the pleadings (or pleadings and proof; or on motion of ..... to submit the issues to a master to take and report the evidence thereon, etc.), and both parties appearing by counsel, and the court having considered the same and being of opinion that it is necessary to take an account (or whatever is necessary to be referred), it is therefore ordered, adjudged and decreed that this cause be referred to the Hon. ...., standing master of this court (or that ....., Esq., be appointed a special master in chancery to whom shall be submitted, etc.), to ascertain and report (here set forth what the master has to investigate and report).

It is further ordered, adjudged and decreed that the master do make and file his report by the ..... day of ....., A. D. 19..., with the clerk of this court to await the further order of this court.

Judge, etc.

See *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 325, for order appointing a Special Master.

There can be no reference on the law side. *Gunn v. Brinkley Car Works & Mfg. Co.* 13 C. C. A. 529, 27 U. S. App. 779, 66 Fed. 383; *Cleveland v. United States*, 62 C. C. A. 393, 127 Fed. 670; *McMullen Lumber Co. v. Strother*, 69 C. C. A. 433, 136 Fed. 296. See *Dartmouth College v. International Paper Co.* 132 Fed. 89. May appoint an auditor. *Fenno v. Primrose*, 56 C. C. A. 313, 119 Fed. 801.

It must show without the least ambiguity what is referred to the master, and should determine clearly the scope of authority, and beyond this, parties cannot consent to have him pass on any matter not in the line of the order of reference. *Taylor v. Robertson*, 27 Fed. 537. If the matter is by consent, and submits the whole case to the decision of the master, then you may use the following form of order:

This cause coming on to be heard upon the application of both parties to refer the issues both of law and fact to a master for his investigation and decision, and it appearing to the court that said cause is at issue and both parties are present, consenting to the reference (or a written consent of reference is on file in the cause), it is therefore ordered, adjudged and decreed that said cause, with its pleadings, evidence and exhibits, be referred to..... to hear and determine the issues of law and fact arising in this cause; and it is further ordered, adjudged and decreed that ..... shall report his conclusions of law and fact and his judgment thereon (if desired you may add "together with the evidence upon which he founds his conclusions") to this court by the.....day of....., A. D. 19..., and the same shall be filed to wait the further action of this court.

Judge, etc.

If either party desires to make a motion for reference, the following form may be used:

Title as in bill.

And now comes A. B., plaintiff in the above cause, and moves the court that the issues in this cause setting up conflicting accounts as between E. F. and C. D. (or so much of the bill as sets up a claim for damages or whatever else it may be desired to refer) be referred to Richard Roe, Esq., the standing master of this Honorable Court (or to appoint a special master, etc.), who shall be required to inquire into and investigate the same and that he report to this court by the.....day of....., A.

D. 19., what, if anything, be due by reason of the claim, etc., and that said report be filed subject to the further order of this court.

R. F.,  
Solicitor.

Give notice of the motion and of time and place to be heard, and if granted enter the order according to the form previously given, except you begin thus:

This cause coming on to be heard upon the motion of A. B., plaintiff, to refer, etc., and both parties being present by counsel, etc.

A master in chancery, being an officer of the court, should be, when the appointment of a special master is asked, made without suggestion of counsel, and therefore the application for a special master should not name any particular person for appointment. Any arrangement or agreement to appoint a special master and fix his compensation in advance is improper, especially when the master to be appointed is a party to the understanding. *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525. Let the court select the master and fix the compensation without suggestion, unless the court invites it.

### *Action to Be Taken After Reference Made.*

When the motion is granted, and the order thereon entered, the mover must, on or before the next rule day after the order is granted, or such other time as the court may direct, bring the matter before the master. Equity rule 74. If the court refers, or the reference be by consent, then the party on whom the burden rests to prove the issue must see that the reference is made as ordered. Upon failure to do so by the next rule day after the order of reference is entered, or as the court may direct, then the opposite party may have the reference made at the cost of the other. Equity rule 74. In either event, the matter is brought before the master by delivering to him a certified copy of the order of reference, and the clerk shall deliver to him the pleadings, evidence, if any, and proceedings in the cause.

*Duty of Master on Receiving Order of Reference.*

As soon as the master can, after receiving the order of reference (equity rule 75), he should assign a time and place for the hearing, and give notice to the parties, or their counsel, as to the particular hour and place he will begin to take testimony, or hear the cause, or whatever may be required by the order of reference. The notice shall require their attendance, and if they do not appear, he can proceed with the investigation, or if this cannot be done, he may adjourn the examination to a future day, giving notice to the absent party or parties of such adjournment.

The master must so speed the cause as to have his report filed with the clerk within the time limited by the order, unless upon his application, or the application of one of the parties to the court, the time has been extended. Equity rule 75.

*Authority of the Master.*

The master is authorized to regulate the proceedings before him. (*Hoe v. Scott*, 87 Fed. 220; equity rule 77). He has full authority and power to swear and examine witnesses, or have them examined in his presence touching all matters referred to him. He may require all books, vouchers, and papers of every character relevant to the issues produced before him. He may order the examination by interrogatories, under a commission to be issued by the clerk of the court, under his certificate, or in any other manner authorized by the acts of Congress, or rules of equity, and he may do what is necessary to reach the truth and justice of the particular matter referred to him. Equity rule 77; *Goss Printing Press Co. v. Scott*, 119 Fed. 941. By equity rule 81 he has authority to examine any creditor or other person filing a claim, either *viva voce* or upon interrogatories, or in both modes, as the nature of the case may demand. *Terry v. Bank of Cape Fear*, 20 Fed. 781, 782.

*Beyond Territorial Jurisdiction.*

The master can take testimony outside of the territorial jur-

isdiction of the court appointing him, and also in foreign countries (Consolidated Fastener Co. v. Columbus Button & Fastener Co. 85 Fed. 54; Gulf & B. Valley R. Co. v. Winder, 26 Tex. Civ. App. 263, 63 S. W. 1046), either in person or under a commission, as before stated; but, while he may thus take testimony by examinations *viva voce*, he must pursue the method of least cost to litigants. Equity rule 67; *Ibid.*; Bate Refrigerating Co. v. Gillette, 28 Fed. 673; Encyclopaedia Britannia Co. v. Werner Co. 138 Fed. 462; Western Div. of Western N. C. R. Co. v. Drew, 3 Woods, 691, Fed. Cas. No. 17,434.

### *Procedure Before the Master.*

The hearing is conducted in the order of trials in court. The evidence shall be taken down by the master, or by some other person by his order and in his presence, who has been duly sworn by the master for the particular service.

### *Taking Evidence.*

Unless the master is acting as examiner only, the admission and rejection of evidence rests in his sound discretion (*Wooster v. Gumbirner*, 20 Fed. 167; equity rule 77); but the objections to any proceeding had, or to any evidence admitted or rejected, must be duly noted by the master (*Kansas Loan & T. Co. v. Electric R. Light & P. Co.* 108 Fed. 704; *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.* 173 Fed. 797; *Blease v. Garlington*, 92 U. S. 1, 23 L. ed. 521), with the grounds of objection, if it is desired to take advantage of the ruling by exceptions to the master's report, as will be hereinafter explained. In taking testimony the court will not entertain a motion to instruct or control the master in the admission of testimony during the investigation, or before the report is made. *Lull v. Clark*, 22 Blatchf. 207, 20 Fed. 454; *Bate Refrigerating Co. v. Gillette*, 28 Fed. 673; *DeRoux v. Girard*, 90 Fed. 537; *Hoe v. Scott*, 87 Fed. 220.

By equity rule 80 all affidavits, depositions, and documents which have been previously filed, read, or used in the cause may be used before him. By equity rule 79, in matters of ac-

counting, creditors must bring in their respective accounts in the form of debits and credits, and anyone interested may examine the accounting party *viva voce* in reference to the same, or upon interrogatories, as the master may direct. Pulliam v. Pulliam, 10 Fed. 24-31. The master has great discretion in adjourning for the convenience of parties and witnesses, but he may refuse to adjourn to obtain additional evidence after ample time has been given and long delays occasioned. Third Nat. Bank v. National Bank, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 852.

### *Report of the Master.*

As soon as the evidence is concluded, the Master should prepare his report *in direct response* to the order of reference, whether the reference is to report back the evidence, or the master's conclusions of fact. Equity rule 76 provides that the master shall recite in his report no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before him, but they should be identified, specified, and referred to, so as to inform the court as to the basis of his report, and if there is substantial evidence to sustain his findings or statement of the facts. Huttig Sash & Door Co. v. Fuelle, 143 Fed. 367. In Weiss v. Haight & F. Co. 148 Fed. 399 it is said that it is not necessary for the master to report all the evidence taken, unless required by the order of reference. In Dartmouth College v. International Paper Co. 132 Fed. 91 (law case), a motion was made to require the master to send up the testimony taken and depositions, and the court held that while it was in its discretion to do so, yet it would not be ordinarily exercised after the report has been filed. In this case the reference was to ascertain the amount of damages to be recovered.

When referred to hear and determine all issues, it is not necessary to report his finding on all issues; a report of the result is sufficient. Hecker v. Fowler, 2 Wall. 132, 17 L. ed. 761.

As soon as the report is prepared the master is required by equity rule 83 to return the same to the clerk's office which return shall be entered in the clerk's order book. National

*Folding Box & Paper Co. v. Dayton Paper Novelty Co.* 91 Fed. 822. The parties have no vested right in it, as the report is only advisory, and it may, in the discretion of the court, be permitted to withdraw it for amendment or rereference. *Ibid.* 824. *Bliss v. Anaconda Copper Min. Co.* 167 Fed. 342-347. Of course the report must be returned within the time required by the order, unless, upon application and for cause shown, further time has been allowed.

### *Exceptions to the Report.*

*Time of Filing.*—By equity rule 83 the parties have one month from the filing of the report within which to except, and if no exceptions are filed, the report stands confirmed on the next rule day after the time for exceptions has expired. The one month given to file exceptions means a calendar month, not a lunar month. To illustrate: If the report is filed on the first of a month, a confirmation before the second day of the following month would be premature. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 374, 375; *Gasquet v. Crescent City Brewing Co.* 49 Fed. 493; *Pewabic Min. Co. v. Mason*, 145 U. S. 363, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; *Central Trust Co. v. Sheffield & B. Coal, Iron & R. Co.* 60 Fed. 15.

Judgment cannot be entered unless parties have had an opportunity to except. *Elkin v. Denver Engineering Works Co.* 181 Fed. 686, and cases cited.

The court will not hear exceptions filed after the time, unless the failure to file was occasioned by fraud, accident, or mistake. *Gasquet v. Crescent City Brewing Co.* 49 Fed. 494; *Ex parte Jordan*, 94 U. S. 252, 24 L. ed. 125. (See chapter 95.)

### *When to Be Heard.*

When exceptions are filed, they stand for hearing before the court if in session, if not, then at the next sitting of the court, which shall be hereafter by adjournment or otherwise.

### *Form of Exceptions.*

Title as in bill.

And now comes A. D., plaintiff (or defendant), and excepts to the re-

port of....., Esq., the standing (or special) master, filed in this cause on the.....day of....., A. D. 19..., and for cause of exception shows:

First. That the master has in said report stated and certified that, etc. (state it), whereas the master ought to have found that, etc.

Second. That the master, in the trial of the cause, premitted, over exceptions taken at the time as shown by the record, one E. F. to testify that, etc., when in fact the evidence was not admissible because (state objections).

Third. That the master refused to allow H. R. to testify on objection of (plaintiff or defendant), who, if he had been permitted to testify, would have sworn, etc., all of which was duly excepted to at the time as appears of record.

And so on, stating each ground of exception.

R. F.,  
Solicitor, etc.



## CHAPTER XCV.

### EXCEPTIONS TO BE SPECIFIC.

Exceptions are special demurrers to the report (*General Fire Extinguisher Co. v. Lamar*, 72 C. C. A. 501, 141 Fed. 353-355, and cases cited), and must point out, article by article, the matter objected to and cause of objection. They should be precise and raise well-defined issues. *Ibid.*; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 290, 38 L. ed. 165, 14 Sup. Ct. Rep. 343; *Fordyce v. Omaha, K. C. & E. R. Co.* 145 Fed. 544-557; *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 275, 109 Fed. 219. Vagueness and generality are good grounds for overruling them. *Ibid.*; *Re Covington*, 110 Fed. 143; *Neal v. Briggs*, 110 Fed. 477.

As before stated, cases are referred to a master to economize time, and if general exceptions are permitted, the court would have to review the whole case, and the effect of the reference thus be lost. *Neal v. Briggs*, 110 Fed. 478; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 286, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; *Jones v. Lamar*, 39 Fed. 585; *Chandler v. Pomeroy*, 87 Fed. 267; *Medsker v. Bonebrake*, 108 U. S. 71, 72, 27 L. ed. 655, 656, 2 Sup. Ct. Rep. 351. Equity rule 84, to prevent frivolous exceptions for mere delay, provides for a party excepting to pay the costs when exceptions overruled, and *vice versa*.

Again, when exceptions are based on irrelevancy and incompetency, or objections to evidence or witness, they must show that the objections were taken before the master and preserved in the record, as well as the specific grounds of the objection. Equity rule 77; *Fischer v. Neil*, 6 Fed. 90; *Lull v. Clark*, 22 Blatchf. 207, 20 Fed. 454; *Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 567, 568, 15 Mor. Min. Rep. 314; *Bliss v. Anaconda Copper Min. Co.* 156 Fed. 311, reviewing cases. *Evanston v. Gunn*, 99 U. S. 665, 25 L. ed. 307; *Burton v. Driggs*, 20 Wall. 133, 22

L. ed. 301; *Wooster v. Gumbirner*, 20 Fed. 167; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476; *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 67; See *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512. Exceptions must be supported by the statement of the master, or by the evidence, to which attention must be called (*Jaffrey v. Brown*, 29 Fed. 477; *Cutting v. Florida R. & Nav. Co.* 43 Fed. 743; *Farrar v. Bernheim*, 20 C. C. A. 496, 41 U. S. App. 172, 74 Fed. 438; s. c. 21 C. C. A. 264, 75 Fed. 136; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285-293, 38 L. ed. 164-166, 14 Sup. Ct. Rep. 343; *McCourt v. Singers-Bigger*, 145 Fed. 112); and the particular error, or erroneous principle upon which the master acted must be pointed out. *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *Mason v. Crosby*, 3 Woodb. & M. 258, Fed. Cas. No. 9,236. A new defense cannot be set up by exceptions. If, however, the master fails to report all evidence upon the matter to which a proper exception has been taken, the party should apply to the court for a further report. *Story v. Livingston*, 13 Pet. 367, 10 L. ed. 204.

### *Effect of Withdrawal of Exceptions.*

The withdrawal of exceptions in the order book leaves the report confirmed (equity rule 83); for, in the absence of exceptions, there can be no inquiry into the correctness of the facts found; only misapprehension of the legal consequences are open for correction. *St. Louis Union Trust Co. v. Texas Southern R. Co.* — Tex. Civ. App.—, 126 S. W. 308; *Burke v. Davis*, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 907; *Re Carver*, 113 Fed. 138; *Gasquet v. Crescent City Brewing Co.* 49 Fed. 493; *Green v. Bogue*, 158 U. S. 504, 39 L. ed. 1070, 15 Sup. Ct. Rep. 975; *Hamm v. J. Stone & Sons Live Stock Co.* 18 Tex. Civ. App. 241, 45 S. W. 330. As to waiver of, see *Waterman v. Banks*, 144 U. S. 407, 36 L. ed. 484, 12 Sup. Ct. Rep. 646.

### *Waiving Exceptions Not Taken Before Master.*

The question arises, what exceptions are waived if not taken before the master before filing his report. We have seen that

equity rule 83 gives one month within which to file exceptions to the master's report; but can under this rule any character of exception be filed that was not taken during the trial before the master? In *Story v. Livingston*, 13 Pet. 366, 10 L. ed. 203, the court held that all exceptions should be taken before the master in order to save time and give him an opportunity to correct his errors and reconsider his opinion, and a failure to do so prevents a party from excepting after the report is filed, unless the court should refer it back to take exceptions.

This decision was made in 1839, when the Federal courts adhered to the English practice in this respect. *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177; *American Nicholson Pav. Co. v. Elizabeth*, 1 Bann. & Ard. 439, Fed. Cas. No. 309; *Gass v. Stinson*, 2 Sumn. 605, Fed. Cas. No. 5,261. The practice of England required the master to make a draft of his report and notify counsel, so as to give an opportunity to point out errors. 2 Dan. Ch. Pr. 1314. This procedure was called settling the master's report, but there is no such practice now, because equity rule 83, promulgated in 1842, provides what the master must do with reference to his report, which is to file it as soon as it is prepared, and the parties have one month to except to it from the date of filing. This is a cheaper and more expeditious mode than the old practice of settling the report, and is evidently intended by the Supreme Court as a substitute for it. Rules 77-83; *Hatch v. Indianapolis & S. R. Co.* 11 Biss. 138, 9 Fed. 856; *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 374, 375.

In *Hatch v. Indianapolis & S. R. Co.* supra, the court distinctly recognizes that there is no such practice as settling the report before filing, and that a party has thirty days to file such exceptions as he may deem necessary. *Jennings v. Dolan*, 29 Fed. 861.

In *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476, the master had drafted his report after the English method, and the court would not hear exceptions not taken before the master; overruling *Hatch v. Indianapolis & S. R. Co.* 9 Fed. 856, and *Jennings v. Dolan*, 29 Fed. 861, above cited. *McNamara v. Home Land & Cattle Co.* 105 Fed. 202; *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512; *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 798.

In *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 374, the court held that exceptions to the master's report could be taken within thirty days after filing the report, whether taken before the master or not, and the practice followed in 13 Pet. had been abrogated. In *Gay Mfg. Co. v. Camp*, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 798, the court followed 13 Pet., reaffirmed the old rule, and refused to hear exceptions not taken before the master. See also *Topliff v. Topliff*, 145 U. S. 173, 36 L. ed. 665, 12 Sup. Ct. Rep. 825.

In *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68, the court followed 65 Fed. 798, but stated that the rule should only extend to issues of fact, and exceptions to conclusions of law were not necessary to be taken before the master. *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 827.

In *Burke v. Davis*, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 910, the exceptions had not been filed in thirty days, but it is strongly intimated that if they had been, they would have been heard, but that the master's conclusions of law could be attacked, with or without exceptions. In *Kilgour v. National Bank*, 97 Fed. 693, the master's conclusions of fact were set aside on exceptions filed in thirty days, and they may be set aside, though the reference be by consent. *Oteri v. Scalzo*, 145 U. S. 589, 36 L. ed. 828, 12 Sup. Ct. Rep. 895; *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 291, 38 L. ed. 166, 14 Sup. Ct. Rep. 343. So may exceptions be filed to conclusions of law, though not excepted to before the master. *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 822.

In view of these cases, it seems that it is still an open question as to what is the proper practice. I will venture to state what should be the rule of practice, and my reasons therefor. The reasons for filing exceptions before the master was to give him an opportunity to correct any errors he may have committed during the trial. *Gay Mfg. Co. v. Camp*, 15 C. C. A. 226, 25 U. S. App. 376, 68 Fed. 68. They are the same reasons that existed under the old practice, requiring a draft of the report on the law and fact, and requiring it to be brought to the attention of counsel, that they might then and there file such exceptions as were necessary, which were to be submitted

to the chancellor if overruled. But does not equity rule 83 change to some extent the old practice, and consequently modify the reasons upon which the old rule was based? Equity rule 83 evidently was intended for some purpose other than to merely repeat exceptions taken before the master, and which have been already incorporated in the record, and the thirty days given for filing is evidently intended to give an opportunity to examine the report for errors. The rule does not intimate that the exceptions to be taken within the time allowed must be only such as were previously entered of record, nor that the exceptions to the conclusions of the master must be taken before filing his report, but excludes this idea by requiring the report to be filed as soon as prepared, and the exceptions to be filed after filing the report.

If the equity rule 83 has any meaning, then it is intended that there are errors which may be committed by the master, and which may be excepted to, though no exception was taken before the master. I therefore suggest the proper practice to be, that in all matters pertaining to the conduct and hearing of the case before the master, and in the admission and rejection of evidence (*Wooster v. Gumbirner*, 20 Fed. 167), that any objections thereto must be made before the master, and exceptions reserved, if overruled, and made a part of the record, otherwise the objections will not be heard by the court (*Hamilton v. Southern Nevada Gold & S. Min. Co.* 13 Sawy. 113, 33 Fed. 567, 568, 15 Mor. Min. Rep. 314; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 245; *Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512), but considered waived. No objection to these matters of detail should be heard if not made at the proper time and incorporated in the record. It is fair to counsel and the master, that they should have an opportunity to correct errors of this character, but when the exceptions go to the action of the master involving the merits of the entire case, as his conclusions of law and *fact* and his judgment thereon, they are open to attack under equity rule 83, whether the master's attention was called to the particular ground of error or not. *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* 42 Fed. 372; *Jennings v. Dolan*, 29 Fed. 861; *Hatch v. Indianapolis & S. R. Co.* 11 Biss. 138, 9 Fed. 856.

There is no question, that if a master is correct in his conclusions of fact, but wrong in his conclusions of law, that the court will correct the law, whether the master had an opportunity to correct it or not. *Sheffield & B. Coal, Iron & R. Co. v. Gordon*, 151 U. S. 285, 38 L. ed. 164, 14 Sup. Ct. Rep. 343; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 40 Fed. 476; *Shipman v. Ohio Coal Exch.* 17 C. C. A. 313, 37 U. S. App. 471, 70 Fed. 654; *United States Trust Co. v. Mercantile Trust Co.* 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153; *Home Land & Cattle Co. v. McNamara*, 49 C. C. A. 642, 111 Fed. 827. An appellate court will correct an erroneous construction of a contract by a master, whether excepted to or not (*Ibid.*), and there is no reason why a court should not correct an erroneous conclusion of fact with the whole record before it, even though no exception to the conclusion had been filed before the master. Of course, in the light of what has been said, an objection to conclusions of fact, if based on erroneous admission, or exclusion of testimony not excepted to before the master, would not be considered (*Gray v. New York Nat. Bldg. & L. Asso.* 125 Fed. 512); but there is no reason why conclusions of fact, based on admitted evidence, cannot be excepted to, though no exception to the finding had been made before the master.

There is one character of reference, perhaps, where an exception to conclusions of fact may be considered waived if not taken before the master. This rule may be applied when the entire case *by consent* of parties has been referred to a master for his judgment and decision on both law and fact, for reasons that will appear in discussing the "Effect of the Master's Report." *McNamara v. Home Land & Cattle Co.* 105 Fed. 202; *Kimberly v. Arms*, 129 U. S. 524, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720. But where the cause has been referred on motion of one of the parties, or by the court on his own motion, the litigant yields no right, by proper exception under equity rule 83, to have his cause finally determined by the court on the law and fact, whether excepted to before the master or not.

In *Bliss v. Anaconda Copper Min. Co.* 156 Fed. 309, reviewing many of the cases cited above, it is suggested that it is the duty of the master to submit to counsel a draft of his

report, thereby inviting suggestions as to error, if any, in the conclusions reached; and counsel in response should make at once such objections as may appear to them to be proper, before the return of the master's report; and it is within the discretion of the court to refuse to entertain any objection not made before the master. It is further suggested that counsel should agree that exceptions thus taken before the master should be considered as exceptions taken under rule 83, in order to avoid duplicating. Ibid. 313. This method is clearly not within the letter or spirit of the rule that contemplates exceptions to the merits to be filed at any time within thirty days. *Bridges v. Sheldon*, 18 Blatchf. 295, 7 Fed. 19.

## CHAPTER XCVI.

### EFFECT OF THE MASTER'S REPORT.

The report of a master, whether special or general, is entirely within the power of the court to set aside, modify, or correct in any manner consistent with the justice of the case, but the power should not be exercised but for good cause shown. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* 91 Fed. 824; *Jaffery v. Brown*, 29 Fed. 477; *Stanton v. Alabama & C. R. Co.* 31 Fed. 585; *Thomson v. Wooster*, 114 U. S. 104-112, 29 L. ed. 105-108, 5 Sup. Ct. Rep. 788.

The report on the facts has been given the effect of a verdict of a jury upon an issue sent to them by the chancellor, which in equity is only advisory. *Oil Well Co. v. Hall*, 63 C. C. A. 343, 128 Fed. 878; *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, 90 C. C. A. 585, 164 Fed. 809, 810; *Bliss v. Anaconda Copper Min. Co.* 167 Fed. 342-347; *Flippen v. Kimball*, 87 Fed. 259; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882 (see section 723). However, it is said in *Bosworth v. Hook*, 23 C. C. A. 404, 46 U. S. App. 598, 77 Fed. 686, that when the reference is on motion of one of the parties, and not by the consent of both, the master's finding has not the force of a verdict, or the report of a referee, and upon exception thereto, the court must determine by its own judgment the controversy presented. *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *Babcock v. DeMott*, 88 C. C. A. 64, 160 Fed. 882; *Knoxville v. Knoxville Water Co.* 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148.

The rule is that the findings of fact by the master have all the presumptions in their favor, and should not be set aside, unless error clearly appears, and this is especially true when submitted by consent. *Crawford v. Neal*, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759, and cases cited; *Cimiotti*



Unhairing Co. v. American Fur Ref. Co. 93 C. C. A. 546, 168 Fed. 529; Lake Erie & W. R. Co. v. Fremont, 34 C. C. A. 625, 92 Fed. 731; Davis v. Schwartz, 155 U. S. 636, 39 L. ed. 291, 15 Sup. Ct. Rep. 237; Girard Life Ins. Annuity & T. Co. v. Cooper, 162 U. S. 538, 40 L. ed. 1065, 16 Sup. Ct. Rep. 879; Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363; Cimotti Unhairing Co. v. American Fur Ref. Co. 158 Fed. 171; Murphy v. Southern R. Co. 99 Fed. 469; s. c. 53 C. C. A. 477, 115 Fed. 259; Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 219; Singleton v. Felton, 42 C. C. A. 57, 101 Fed. 527; Walters v. Western & A. R. Co. 69 Fed. 710; Emil Kiewert Co. v. Juneau, 24 C. C. A. 294, 47 U. S. App. 394, 78 Fed. 712; Central Trust Co. v. East Tennessee Land Co. 79 Fed. 19; Chandler v. Pomeroy, 87 Fed. 262. It is *prima facie* correct. Guarantee Gold Bond Loan & Sav. Co. v. Edwards, 90 C. C. A. 585, 164 Fed. 810; Crawford v. Neal, 144 U. S. 596, 36 L. ed. 557, 12 Sup. Ct. Rep. 759; Gay Mfg. Co. v. Camp, 13 C. C. A. 137, 25 U. S. App. 134, 65 Fed. 794; Lake Erie & W. R. Co. v. Fremont, 34 C. C. A. 625, 92 Fed. 731; Kilgour v. National Bank, 97 Fed. 693; Davis v. Schwartz, 155 U. S. 636, 39 L. ed. 291, 15 Sup. Ct. Rep. 237; Furrer v. Ferris, 145 U. S. 134, 36 L. ed. 651, 12 Sup. Ct. Rep. 821. The only question is, are the findings supported (Cudahy Packing Co. v. Sioux Nat. Bank, 21 C. C. A. 428, 40 U. S. App. 142, 75 Fed. 475; Chicago, M. & St. P. R. Co. v. Clark, 35 C. C. A. 120, 92 Fed. 983; Steel v. Lord, 35 C. C. A. 555, 93 Fed. 729; Shipman v. Straitsville Central Min. Co. 158 U. S. 356, 39 L. ed. 1015, 15 Sup. Ct. Rep. 886), and should not be overruled, unless manifestly wrong. The Elton, 31 C. C. A. 496, 42 U. S. App. 666, 83 Fed. 520; Denver & R. G. R. Co. v. Ristine, 23 C. C. A. 13, 40 U. S. App. 579, 77 Fed. 59; Crawford v. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Kunsemiller v. Hill, 29 C. C. A. 658, 57 U. S. App. 523, 86 Fed. 200; Western U. Teleg. Co. v. American Bell Teleph. Co. 105 Fed. 686; Taintor v. Franklin Nat. Bank, 107 Fed. 825; Columbus S. & H. R. Co.'s Appeal, 48 C. C. A. 275, 109 Fed. 180; Ferguson Contracting Co. v. Manhattan Trust Co. 55 C. C. A. 529, 118 Fed. 792; Singleton v. Felton, 42 C. C. A. 57, 101 Fed. 526. This rule is applicable to disputed facts, but not to conclusions from undisputed

facts, or the construction of a document. *United States Trust Co. v. Mercantile Trust Co.* 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153, and the court will not always enforce the rule as given. *United States Trust Co. v. Omaha & St. L. R. Co.* 63 Fed. 742; *Knoxville v. Knoxville Water Co.* 212 U. S. 8, 53 L. ed. 378, 29 Sup. Ct. Rep. 148; *Bosworth v. Hook*, 23 C. C. A. 404, 46 U. S. App. 598, 77 Fed. 686, 687; *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355.

### *Effect of Findings by Masters in Chancery.*

The findings in matters of account because of the nature of the evidence will be rarely set aside or interfered with. *Camden v. Stuart*, 144 U. S. 118, 36 L. ed. 368, 12 Sup. Ct. Rep. 585; *Tilghman v. Proctor*, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *Callaghan v. Myers*, 128 U. S. 619, 32 L. ed. 550, 9 Sup. Ct. Rep. 177; *Robinson v. Alabama & G. Mfg. Co.* 89 Fed. 221. So in findings in damages, error must be obvious (*Warren v. Keep*, 155 U. S. 265-267, 39 L. ed. 144, 145, 15 Sup. Ct. Rep. 83); or value of stock of goods, etc. (*Reading Ins. Co. v. Egelhoff*, 115 Fed. 393). A reference to a master commissioner, there being no such officer, would not affect the report. *Shipman v. Straitsville Central Min. Co.* 158 U. S. 361, 39 L. ed. 1016, 15 Sup. Ct. Rep. 886. (See "Who to be Appointed.")

### *Effect When Reference by Consent.*

When a cause is submitted to a master by consent to hear and determine the questions of law and fact, and report his conclusions thereon, the courts take a different view of the force and effect of the master's findings than when the submission has been made on motion of one of the parties, or by the court on its own motion. *Guarantee Gold Bond Loan & Sav. Co. v. Edwards*, 90 C. C. A. 585, 164 Fed. 810; *Jefferson Hotel Co. v. Brumbaugh*, 94 C. C. A. 279, 168 Fed. 867-872; *Third Nat. Bank v. National Bank*, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 858; *Chauncey v. Dyke Bros.* 55 C. C. A. 579, 119 Fed. 21, 22; *Blassengame v. Boyd*, 101 C. C. A. 129, 178

Fed. 1; *Spring Garden Ins. Co. v. Amusement Syndicate Co.* 102 C. C. A. 29, 178 Fed. 531. The leading case upon the effect of reference by consent is *Kimberly v. Arms*, 129 U. S. 513, 32 L. ed. 764, 9 Sup. Ct. Rep. 355, familiarly known as the Arms Case. This case has been followed in *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; *Davis v. Schwartz*, 155 U. S. 637, 39 L. ed. 293, 15 Sup. Ct. Rep. 237; *Singleton v. Felton*, 42 C. C. A. 57, 101 Fed. 526, 527; *Schwartz v. Duss*, 43 C. C. A. 323, 103 Fed. 565; *Western U. Teleg. Co. v. American Bell Teleph. Co.* 105 Fed. 686; *Sanders v. Riverside*, 55 C. C. A. 240, 118 Fed. 720; *Fidelity & C. Co. v. St. Matthews Sav. Bank*, 44 C. C. A. 225, 104 Fed. 861; *Walker v. Kinnare*, 22 C. C. A. 75, 46 U. S. App. 150, 76 Fed. 101; *Walters v. Western & A. R. Co.* 69 Fed. 710; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 32.

The Arms Case substantially holds that when a case has been referred by consent to a master to determine the issues of law and fact, and such reference is entered as a rule of court, it is in effect the submission of a controversy to a private tribunal, whose decisions are not subject to be set aside and disregarded by the court. The special tribunal being agreed upon, there is no reason to give to its conclusions less weight than when decided by the court. *Ibid.*; *Farrar v. Bernheim*, 20 C. C. A. 496, 41 U. S. App. 172, 74 Fed. 438; s. c. 21 C. C. A. 264, 75 Fed. 136; *Grayson v. Lynch*, 163 U. S. 473, 41 L. ed. 232, 16 Sup. Ct. Rep. 1064; *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289, 15 Sup. Ct. Rep. 237; see *Elkin v. Denver Engineering Works Co.* 181 Fed. 684. And if the conclusions are drawn from disputed facts, they are unassailable. *Davis v. Schwartz*, 155 U. S. 631-636, 39 L. ed. 289-291, 15 Sup. Ct. Rep. 237; *Kimberly v. Arms*, 129 U. S. 512, 32 L. ed. 764, 9 Sup. Ct. Rep. 355; *United States Trust Co. v. Mercantile Trust Co.* 31 C. C. A. 427, 59 U. S. App. 330, 88 Fed. 153; *Ferguson Contracting Co. v. Manhattan Trust Co.* 55 C. C. A. 529, 118 Fed. 791.

It is in such cases, perhaps, that the contention that exceptions to the conclusions of the master should be taken before the master, or they will be considered waived, is correct, because, having referred your case to a special tribunal by con-

sent, the errors which you assign on an appeal from its decision must have been passed upon adversely by the special tribunal. *McNamara v. Home Land & Cattle Co.* 105 Fed. 202-204, and authorities; but see 111 Fed. 822.

*Re-reference to a Master.*

In stating exceptions to a master's report, there may be a prayer for re-reference, but this may be done by motion. *National Folding Box Co. v. Dayton Paper Novelty Co.* 91 Fed. 822. However, after the report is filed and exceptions taken, courts will not readily grant a re-reference, unless the report shows that further investigation is necessary to a proper decree. Mere inaccuracies of statement, or omissions made, or even vacating the report, would not be cause for a re-reference. There must be some material injury, or a finding unjust in its consequences, or want of sufficient finding, to enter a proper decree. *McElroy v. Swope*, 47 Fed. 380. Inaccuracies may usually be corrected from the record. *Fischer v. Hayes*, 16 Fed. 469; *Witters v. Sowles*, 43 Fed. 405; *Jennings v. Dolan*, 29 Fed. 862; *Taylor v. Robertson*, 27 Fed. 537; *Cimiotti Unhairing Co. v. Bowsky*, 113 Fed. 699; *Empire Trust Co. v. Egypt R. Co.* 182 Fed. 100. But if the facts be imperfectly stated, so that it is apparent that further evidence is needed, or if unsatisfactory and other evidence can be obtained, and the justice of the case demands it, a re-reference will be ordered; but in the absence of these features, the court will not, after the report has been filed, permit the case to be reopened for further evidence, especially cumulative evidence (*Ibid.*; *Central Trust Co. v. Georgia P. R. Co.* 83 Fed. 386-399); s. c. 81 Fed. 281; nor re-refer it on a point as to which neither party requested a finding. *Reading Ins. Co. v. Egelhoff*, 115 Fed. 393. The master may, before the case leaves his hands, reopen it for good cause shown, to hear further evidence. *Central Trust Co. v. Richmond & D. R. Co.* 69 Fed. 762; *Central Trust Co. v. Marietta & N. G. R. Co.* 75 Fed. 41. But when there has been long delay through negligence, he should refuse. *Third Nat. Bank v. National Bank*, 30 C. C. A. 436, 58 U. S. App. 148, 86 Fed. 852.

A re-reference will not be allowed to file an amendment set-

ting up new ground for damages. *Clyde v. Richmond & D. R. Co.* 59 Fed. 394. Nor to allow additional testimony to base a recovery on special views entertained by the master and concurred in by the court. *Central Trust Co. v. Georgia P. R. Co.* 83 Fed. 386. The court, however, may re-refer it, or permit the master to withdraw it for correction and amendment. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* 91 Fed. 822; *Mosher v. Joyce*, 2 C. C. A. 322, 6 U. S. App. 107, 51 Fed. 441. See "Withdrawal." But where the master is thus permitted to withdraw his report, he cannot reverse his former findings without notice to parties. It is within the spirit of equity rule 75. *National Folding Box & Paper Co. v. Dayton Paper Novelty Co.* supra.

### *Compensation of the Master.*

A master's compensation should be measured by the work done, time employed, responsibility assumed, and the magnitude of the interests involved. It should be reasonable, perhaps liberal, but never exorbitant. Equity rule 82. *Pleasants v. Southern R. Co.* 93 Fed. 93. *Finance Committee v. Warren*, 27 C. C. A. 472, 53 U. S. App. 472, 82 Fed. 525; *Middleton v. Bankers & M. Teleg. Co.* 32 Fed. 524; *Brown v. King*, 10 C. C. A. 541, 23 U. S. App. 524, 62 Fed. 529; *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 325; *Brickill v. New York*, 55 Fed. 565.

### *Costs in Equity*

Equity rules 25, 62, 65, 84; *Matheson v. Hanna-Schoelkopf Co.* 128 Fed. 163; *Consolidated C. & V. Min. Co. v. Baker*, 131 Fed. 989; *Westfeldt v. North Carolina Min. Co.* 100 C. C. A. 552, 177 Fed. 133. (See the rules of the various circuits controlling costs. Costs on dismissal, see p. 580.)

## CHAPTER XCVII.

### DECREE.

#### *Definition.*

The decree is the judicial decision in an equity cause upon the particular issues submitted, and can go no further than the prayer of the bill and the allegations as proved. *Washington, A. & G. R. Co. v. Bradley* (Washington, A. & G. R. Co. v. Washington) 10 Wall. 303, 19 L. ed. 895; *Baldwin v. Liverpool & L. & G. Ins. Co.* 59 C. C. A. 660, 124 Fed. 206-208; *Lewis Pub. Co. v. Wyman*, 168 Fed. 760; *McKinney v. Big-Horn Basin Development Co.* 93 C. C. A. 258, 167 Fed. 771.

#### *Classified.*

Decrees are either interlocutory or final. *Richmond v. Atwood*, 17 L.R.A. 615, 2 C. C. A. 596, 5 U. S. App. 151, 52 Fed. 21. The interlocutory decree is an adjudication upon some point arising during the progress of the cause, which does not wholly determine the merits, but is necessary to preserve the subject-matter, the *status quo*, or to facilitate the trial of the case on the merits. All decrees not final, as hereinafter stated, are classed as interlocutory, even though they may settle the equities of the bill, as in *Lodge v. Twell*, 135 U. S. 232, 34 L. ed. 153, 10 Sup. Ct. Rep. 745; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 537, 36 L. ed. 1081, 13 Sup. Ct. Rep. 170; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; *Latta v. Kilbourn*, 150 U. S. 539, 37 L. ed. 1175, 14 Sup. Ct. Rep. 201; *California Nat. Bank v. Stateler*, 171 U. S. 449, 43 L. ed. 234, 19 Sup. Ct. Rep. 6; *Mercantile Trust Co. v. Chicago, P. & St. L. R. Co.* 60 C. C. A. 651, 123 Fed. 392; *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 317; *West v. East Coast Cedar Co.* 51 C. C. A.

416, 113 Fed. 743; Covington v. First Nat. Bank, 185 U. S. 277, 46 L. ed. 908, 22 Sup. Ct. Rep. 645; Southern R. Co. v. Postal Teleg. Cable Co. 179 U. S. 643, 45 L. ed. 356, 21 Sup. Ct. Rep. 249.

### *Final Decree.*

A final decree is one that entirely disposes of the cause, so that nothing is left for the court to adjudicate (2 Dan. Ch. Pr. 974n); or a decree that disposes ultimately of the suit (Adams, Equity, page 375); or a final decree is one determining the litigation on its merits, and leaves nothing to be done, but to enforce by order or execution, what has been determined by the court. Ibid.; Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4; Blythe v. Hinckley, 84 Fed. 238; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; New Orleans v. Peake, 2 C. C. A. 626, 2 U. S. App. 403, 52 Fed. 76; Harrison v. Clarke, 90 C. C. A. 413, 164 Fed. 539; Beebe v. Russell, 19 How. 283-286, 15 L. ed. 668, 669; Odbert v. Marquet, 99 C. C. A. 60, 175 Fed. 50, 51; Wilson v. Smith, 61 C. C. A. 446, 126 Fed. 919; Scriven v. North, 67 C. C. A. 348, 134 Fed. 366; Sanders v. Bluefield Waterworks & Improv. Co. 45 C. C. A. 475, 106 Fed. 587; Easton v. Houston & T. C. R. Co. 44 Fed. 9; St. Louis, I. M. & S. R. Co. v. Southern Exp. Co. 108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6; Andrews v. National Foundry & Pipe Works, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 517; Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 159; Re Michigan C. R. Co. 59 C. C. A. 643, 124 Fed. 730, 731.

Whether it is final depends on its essence, and not on its form, or what it is called. Botter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Standley v. Roberts, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 840; Salmon v. Mills, 13 C. C. A. 372, 27 U. S. App. 732, 66 Fed. 33; Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 557. The controversy must be settled (Hohorst v. Hamburg American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; French v. Shoemaker, 12 Wall. 98, 20 L. ed. 271), and must leave the case in such a condition that if there be an affirmance in the appellate court, the court below will have nothing to do but exe-

cute its judgment. *Connell v. Smiley*, 156 U. S. 339, 39 L. ed. 444, 15 Sup. Ct. Rep. 353; *Marden v. Campbell Printing-Press & Mfg. Co.* 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 812, 813; *Tuttle v. Claflin*, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 8; *Dainese v. Kendall*, 119 U. S. 54, 30 L. ed. 305, 7 Sup. Ct. Rep. 65; *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; *Parsons v. Robinson*, 122 U. S. 115, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1153; *Chicago & O. River R. Co. v. McCammon*, 10 C. C. A. 50, 18 U. S. App. 628, 709, 61 Fed. 776.

So much for classification and definition for the present. As interlocutory and final decrees will be discussed under "Appeals" (see "Final Decree as Basis of Appeal"), I pass on to—

### *Framing the Decree.*

A decree in equity adapts itself to the necessities of each case. *Payne v. Hook*, 7 Wall. 432, 19 L. ed. 262. Its great elasticity is the advantage over the judgment at law, but it should not go beyond the relief necessary to secure complainant in what he is entitled to under the pleadings and prayer. *Underground Electric R. Co. v. Owsley*, 169 Fed. 671; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 650; *Lockhart v. Leeds*, 195 U. S. 427-437, 49 L. ed. 263-269, 25 Sup. Ct. Rep. 76; *Gage v. J. F. Smyth Mercantile Co.* 87 C. C. A. 377, 160 Fed. 426; *Graham v. La Crosse & M. R. Co.* 3 Wall. 710-712, 18 L. ed. 251, 252. Or it may be entered on conditions, as doing equity. *Andrews v. Connolly*, 145 Fed. 43; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 81 C. C. A. 643, 152 Fed. 861; *Farmers' Loan & T. Co. v. Denver, L. & G. R. Co.* 60 C. C. A. 588, 126 Fed. 46-50. It may provide for payment of future instalments. *Dancel v. Goodyear Shoe Machinery Co.* 137 Fed. 157-161. Or it may conform the decree to the case made. *Bracken v. Neill*, 15 Tex. 110, but see *Baldwin v. Liverpool & L. & G. Ins. Co.* 59 C. C. A. 660, 124 Fed. 208.

### *Who to Prepare.*

The solicitor of the party obtaining the decree must prepare it for the judge's signature. If for the plaintiff, it must be prepared in accordance with the prayer of the bill, or what-



ever part thereof is granted by the court. *Crocket v. Lee*, 7 Wheat. 525, 5 L. ed. 514; *Simms v. Guthrie*, 9 Cranch, 27, 3 L. ed. 644. After drawing the decree, it must be submitted to opposite counsel, and such objections as are made to the draft must be noted, and if not admitted by counsel, they must be presented to the court for settlement. If there is no objection to the decree, or after objections made have been settled by the court, it must then be presented for the judge's signature, after which it is delivered to the clerk for record in the minutes of the court.

If the judgment is for the defendant, his solicitor draws the decree dismissing the bill, but if the defendant is in by cross bill, praying affirmative relief, which is granted, then his counsel draws the decree, as required when plaintiff recovers.

### *Rules Referring to Drawing Decrees.*

By equity rule 86 it is provided that in drawing decrees and orders, neither the bill nor answer nor other pleadings, nor any part thereof, nor the report of any master, nor any other proceeding shall be recited or stated in the decree or order; but the decree or order shall begin in substance as follows:

This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows (here insert the decree or order).

### Equity rules 8, 9, 73.

The decree should be expressed in apt terms, and set forth the exact conclusion of the court, especially as to any act to be done, or not done; and in case anything is to be done, time, mode, and conditions must be clear and plain. Equity rule 8. The decree must conform to the allegations, proof and prayer. *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513; *Simms v. Guthrie*, 9 Cranch, 19-27, 3 L. ed. 642-645.

By equity rule 73 it is provided that every decree for an account of the personal estate of a testator, or intestate, shall contain a direction to the master to whom it is referred to state what parts, if any, are outstanding, or undisposed of, unless otherwise directed.

By equity rule 92 it is provided that in foreclosure suits a decree for any balance over and above the proceeds of the sale under the mortgage may be entered with an execution for such balance, as provided in equity rule 8, where the decree is solely for money. However broad the terms of the decree, it will be read in the light of the pleading and proof. *Graham v. Chamberlain*, 3 Wall. 710-712, 18 L. ed. 251, 252; *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 513. As to necessity of signing, see *Ommen v. Talcott*, 180 Fed. 927. See also *United States v. Stoller*, 180 Fed. 910.

### *Recording the Decree.*

Counsel can rely on the clerk to correctly transcribe the decree, and his failure to do so does not affect the relief granted. *Blythe v. Hinckley*, 84 Fed. 228. Has no effect until entry. *Ommen v. Talcott*, 180 Fed. 927.

### *Correcting Errors.*

Clerical errors in decrees, or errors of omission, can be corrected at any time before recording, upon application to the court, without the expense of a rehearing. Equity rule 85; *Witters v. Sowles*, 32 Fed. 131; *Hicklin v. Marco*, 64 Fed. 609; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691; *Ommen v. Talcott*, 180 Fed. 927; *Re Wight*, 134 U. S. 136, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Lincoln Nat. Bank v. Perry*, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 887. See "Rehearing" for further discussion over decrees during the term.

As distinguished from *altering* or *amending* the decree, courts may correct errors after the term, first, when the necessity and matter to make the correction appears of record; or, second, when the matter requiring correction rests in the recollection of the court, or may be proved *aliunde*. *Odell v. Reynolds*, 17 C. C. A. 317, 37 U. S. App. 447, 70 Fed. 656-659, and cases cited; *Gilmer v. Grand Rapids*, 16 Fed. 708-710; *Re Wight*, 134 U. S. 136-143; *Bernard v. Abel*, 84 C. C. A. 361, 156 Fed. 652, and cases cited; *Gagnon v. United States*, 193 U. S. 456, 48 L. ed. 747, 24 Sup. Ct. Rep. 510; *Whiting v. Equi-*

table Life Assur. Soc. 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 200; Lincoln Nat. Bank v. Perry, 14 C. C. A. 273, 32 U. S. App. 15, 66 Fed. 888, 889.

### *Amending Decree.*

Judgments may be *amended* by the court during the term (Ibid.; Whiting v. Equitable Life Assur. Soc. 8 C. C. A. 558, 13 U. S. App. 597, 60 Fed. 197; Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696; Bronson v. Schulten, 104 U. S. 415, 26 L. ed. 799; Mahler v. Animarium Co. 64 C. C. A. 329, 129 Fed. 897; Ex parte Lange, 18 Wall. 167, 21 L. ed. 876; Goddard v. Ordway, 101 U. S. 752, 25 L. ed. 1043; Webster v. Oliver Ditson Co. 171 Fed. 895); but not after the term, except in correcting errors apparent, as before stated (Phillips v. Negley, 117 U. S. 678, 29 L. ed. 1016, 6 Sup. Ct. Rep. 901; Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; Vandorn v. Pennsylvania R. Co. 35 C. C. A. 282, 93 Fed. 271; Campbell v. James, 31 Fed. 526; Morgan's L. & T. R. & S. S. Co. v. Texas, 32 Fed. 530; Doe v. Waterloo Min. Co. 60 Fed. 643; Petersburg Sav. & Ins. Co. v. Dellatorre, 17 C. C. A. 310, 30 U. S. App. 504, 70 Fed. 645; Tubman v. Baltimore & O. R. Co. 190 U. S. 39, 47 L. ed. 947, 23 Sup. Ct. Rep. 777; McGregor v. Vermont Loan & T. Co. 44 C. C. A. 146, 104 Fed. 710; Klever v. Seawall, 12 C. C. A. 653, 22 U. S. App. 458, 65 Fed. 378, 379; Mootry v. Grayson, 44 C. C. A. 83, 104 Fed. 613; Easton v. Houston & T. C. R. Co. 44 Fed. 10; Home Street R. Co. v. Lincoln, 89 C. C. A. 133, 162 Fed. 137; Virginia T. & C. Steel & I. Co. v. Harris, 80 C. C. A. 658, 151 Fed. 435; Thomson v. Dean, 7 Wall. 345, 19 L. ed. 95). It cannot be done by motion, but only by a bill in equity. Ibid.; King v. Davis, 137 Fed. 217, 218, and cases cited; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 364. Except where a motion was made at the term and continued by the court over. Walker v. Moser, 54 C. C. A. 262, 117 Fed. 232; Amy v. Watertown, 130 U. S. 313, 32 L. ed. 950, 9 Sup. Ct. Rep. 530; Manning v. German Ins. Co. 46 C. C. A. 144, 107 Fed. 53.

It has, however, been held that in decrees, as in foreclosures, which direct the manner in which the decree shall be enforced,

it is in the power of the court to change or modify this feature of the decree at any term of the court, because such provision in a decree is only in effect an equitable execution, and there is no vested right in a party to have the execution of a decree performed in any particular manner. *Mootry v. Grayson*, 44 C. C. A. 83, 104 Fed. 613; *Royal Trust Co. v. Washburn, B. & I. R. Co.* 113 Fed. 536; *Graham v. Coolidge*, 30 Tex. Civ. App. 273, 70 S. W. 231; see *Earle v. McCartney*, 112 Fed. 372; *Thomson v. Dean*, 7 Wall. 346, 19 L. ed. 95.

### *Force of the Decree.*

The decree is conclusive on all issues joined (*Russell & Co. v. Lamb*, 49 Fed. 771; *Manhattan Trust Co. v. Trust Co. of N. A.* 46 C. C. A. 322, 107 Fed. 328-332; *Black v. Caldwell*, 83 Fed. 884; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 570, 571; *Confectioners' Machinery & Mfg. Co. v. Racine Engine & Mach. Co.* 163 Fed. 915; *Russell v. Russell*, 129 Fed. 434-438; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 78 C. C. A. 33, 147 Fed. 904; *Garner v. Second Nat. Bank*, 89 Fed. 636), as well as those that should obviously have been made (*Ibid.*; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195; *Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.* 5 C. C. A. 249, 12 U. S. App. 320, 55 Fed. 690; *Smith v. Ontario*, 18 Blatchf. 454, 4 Fed. 386; *Burton v. Huma*, 37 Fed. 738; *Chavent v. Schefer*, 59 Fed. 232; see *Russell v. Russell*, 129 Fed. 438). Or, to state it in another form, a decree is conclusive as to all facts without the admission or proof of which the decree could not have been rendered. *Kilham v. Wilson*, 50 C. C. A. 454, 112 Fed. 572; see also *Wilson v. Smith*, 117 Fed. 711; *Ætna L. Ins. Co. v. Hamilton County*, 54 C. C. A. 468, 117 Fed. 84.

While most of the cases cited refer to judgments at law, yet there is no essential difference between the effect of the decree in equity and judgment at law. *Thompson v. Roberts*, 24 How. 240, 16 L. ed. 649; *Kilham v. Wilson*, 50 C. C. A. 454, 112 Fed. 573. However, in some cases, as in *Russell v. Russell*, 129 Fed. 438, it is intimated that there is a difference. Where by the terms of a decree anything is ordered to be done,

as a transfer of property, the effect of the act when done is to invest the transfer with rights of ownership, as completely as if it had been under execution, or order of sale. *Thomson v. Dean*, 7 Wall. 345, 19 L. ed. 95.

*Presumed to Be Right.*

A decree in equity is presumed to be right. *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 88, and cases cited; *Big Six Development Co. v. Mitchell*, 1 L.R.A.(N.S.) 332, 70 C. C. A. 569, 138 Fed. 280.

*Acting on the Person.*

It is an ancient maxim that "equity acts upon the person." It was only the expression of the fact that anciently the chancellor could not bind the right, but only coerce the person. But this bearded maxim has been shorn of much of its force, for now equity binds the right, and coercion of the party has but limited application in modern practice. The most forcible illustrations of its application are found in injunctions, and where the parties are within the jurisdiction of the court, but the property to be affected by the decree is beyond the jurisdiction of the court.

It will be seen under "Enforcement of Decrees" that the Federal courts, through the equity rules, still retain the right to coerce the person, where an act is to be done to render the decree effective, in many of the States; however, decrees establishing an estate, interest, or right of property, divesting out of one party and vesting in another, are by statute made sufficient muniments of title, independent of any action of the parties to the decree, and such decrees may be recorded as title. *Tex. Rev. Stat.* 3625, 4649, 5275.

*Extraterritorial Effect.*

A decree cannot act extraterritorially, that is, it cannot affect lands in other States. *Carpenter v. Strange*, 141 U. S. 105, 35 L. ed. 647, 11 Sup. Ct. Rep. 960; *Remer v. McKay*, 54 Fed. 434; *Dull v. Blackman*, 169 U. S. 247, 42 L. ed. 734, 18

Sup. Ct. Rep. 333. Yet where the court has jurisdiction of the person, it can bind the conscience of the party in regard to land, and compel him to do equity. It may decree a conveyance by him of land in another State and may enforce the decree by process against the defendant. *Miller v. Rickey*, 127 Fed. 580; *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473; *Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 542, 61 U. S. App. 636, 90 Fed. 146; *Gage v. Riverside Trust Co.* 86 Fed. 998. Or remove cloud from title. *Remer v. McKay*, 54 Fed. 432; *Hart v. Sansom*, 110 U. S. 154, 28 L. ed. 103, 3 Sup. Ct. Rep. 586; *Municipal Invest. Co. v. Gardiner*, 62 Fed. 956. It may enjoin a resident suit in another State. *Cole v. Cunningham*, 133 U. S. 116, 33 L. ed. 543, 10 Sup. Ct. Rep. 269; *Gage v. Riverside Trust Co.* 86 Fed. 999.

### *Lien of a Decree.*

By act of 1888, 25 Stat. at L. 357, chap. 729, U. S. Comp. Stat. 1901, p. 701, the decree of a Federal court has the same lien on property in the State where rendered as are given to the judgment and decrees of the courts of the State having general jurisdiction; and whatever is necessary to be done by State statutes to fix and retain the liens of judgments and decrees must be done in the same manner to fix the lien of the Federal decree, provided the State statute authorizes the Federal decrees to be so registered and recorded; or to do whatever is required by the State laws with reference to its own judgments and decrees. *Batts' Rev. Stat. (Tex.) Arts. 3283-3293.*

In 1895 this act was amended (28 Stat. at L. 813, 814, chap. 180), so that it was not necessary to record or register the judgment or decree in the county in which the Federal court was held, in order to fix the lien, if by law the clerk of the United States court be required to have a permanent office there, and a judgment record open at all times for inspection. By U. S. Rev. Stat. sec. 967, U. S. Comp. Stat. 1901, p. 701, decrees of Federal courts cease to be liens in like manner as decrees in State courts.

### *Enforcement of the Decree.*

Remedies in enforcing judgments at law (U. S. Rev. Stat.

sec. 916; U. S. Comp. Stat. 1901, p. 684), do not apply in equity (Hudson v. Wood, 119 Fed. 764). Decrees are controlled by rules of court, and terms of the decree. General Electric Co. v. Hurd, 171 Fed. 984; see Cumberland Lumber Co. v. Tunis Lumber Co. 96 C. C. A. 244, 171 Fed. 352. As to sale of lands in the Federal courts see 27 Stat. at L. 751, chap. 225, U. S. Comp. Stat. 1901, p. 710; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 L. ed. 732, 12 Sup. Ct. Rep. 881; Godchaux v. Morris, 57 C. C. A. 434, 121 Fed. 482; and Files v. Brown, 59 C. C. A. 403, 124 Fed. 133. By equity rule 8 final process to execute any decree may, if the decree be solely for money, be by a writ of execution, as at common law. If for the performance of any specific act, as executing a conveyance of land, or delivering up deeds or other documents, where the time in which the act to be done, which must be stated in the decree has lapsed, and not complied with, then upon affidavit of the plaintiff of the fact, filed with the clerk, he shall be entitled to a writ of attachment against the delinquent party, who, when his person has been attached, shall not be discharged unless upon a full compliance, with the payment of all costs. The court, however, may extend the time of performance, and thus release him. If the delinquent party cannot be found, a writ of sequestration may issue against his estate, upon a return of *non est inventus*, to compel obedience. Equity rule 7; equity rule 8. When the decree requires delivery of possession, which is refused, then upon affidavit of a demand and refusal to obey the decree or order, the party is entitled to a writ of assistance from the clerk of the court. Equity rule 9; equity rule 7, as to interlocutory orders. Alton Water Co. v. Brown, 92 C. C. A. 598, 166 Fed. 840-843; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; Collin County Nat. Bank v. Hughes, 83 C. C. A. 661, 155 Fed. 390; Terrell v. Allison, 21 Wall. 291, 22 L. ed. 635; Root v. Woolworth, 150 U. S. 410, 37 L. ed. 1125, 14 Sup. Ct. Rep. 136.

By equity rule 10 it is provided that every person not being a party in any cause, who has obtained an order, or in whose favor an order shall be made, shall be enabled to enforce obedience by the same process as if he were a party. And every person not being a party to the cause against whom obedience to an order of the court may be enforced shall be liable to the same process for enforcing obedience as if he were a party.

The same rules apply to the enforcement of interlocutory orders and decrees, and the same practice to enforce them. Equity rule 7. You must file in the clerk's office an affidavit, showing the noncompliance of the defendant with the order. The affidavit must show the order, the time within which it was to be obeyed, the default of the defendant, and a prayer for the attachment or whatever process is asked. The clerk is authorized to issue an attachment directed to the United States marshal, commanding him to attach the defendant, if found in the district, and to bring him forthwith (or some appointed day), before the judge of the circuit court of the United States for the . . . district of . . . , in the city of . . . in said district, to answer for contempt in not obeying the decree of the court by which he was directed and required to (State part of the decree that required the act to be done), and you are hereby commanded to detain him in custody until he is discharged by the court.

Witness the Hon. . . . , Chief Justice of the United States, etc.

Attest:

X. Y.,  
Clerk, etc.

The writ of sequestration authorized to be issued against the estate of a person to compel obedience to the decree follows the failure to attach the person because not found. The plaintiff should file a petition reciting the order that has been disobeyed, the issuance of the attachment, the return not found, and then set forth that the defendant has property within the jurisdiction, and ask the court for an order of sequestration.

Judge Shiras says in the second edition of his *Equity Practice*, page 141, that the writ is directed to the sequestrators, that is, the parties selected to take charge of the property. The writ should command them to take possession of the estate of the delinquent defendant, and to hold the same, with its proceeds, rents, and profits for the order of the court, who may ultimately apply it to the satisfaction of the decree, though the primary purpose of the seizure was to coerce the defendant. Although the process is still retained in the rules, there is no reported case that I know of illustrating its use.



*Delivery of Possession.*

If the decree be for possession of property, an affidavit that a party refuses possession authorizes the clerk to issue a writ of possession, directed to the United States marshal, commanding him to put the plaintiff in possession. The writ is a familiar one, and will be issued by the clerk upon application based upon affidavit, as stated. Equity rule 9. (See authorities above.)

*Execution of Decree in Foreclosure.*

In matters of foreclosure, as before stated (equity rule 92), when a decree is rendered for a balance that may be found due over and above the proceeds of sale of the mortgaged property, execution may issue as at common law (equity rule 8; U. S. Rev. Stat. sec. 985; U. S. Comp. Stat. 1901, p. 707; Seattle, L. S. & E. R. Co. v. Union Trust Co. 24 C. C. A. 512, 48 U. S. App. 255, 79 Fed. 187, 188; Northwestern Mut. L. Ins. Co. v. Keith, 23 C. C. A. 196, 40 U. S. App. 706, 77 Fed. 374); and when the decree is for the payment of money, you may use any statutory method provided by a State for collecting. Sage v. St. Paul, S. & T. F. R. Co. 47 Fed. 3.

As to decrees of foreclosure and orders of sale, the forms that are familiar to you in State practice may be used. In enforcing a decree a court cannot require as a precedent condition the payment of money found by a master to be due the defendant, where the facts upon which such finding is based were not pleaded. Burke v. Davis, 26 C. C. A. 675, 53 U. S. App. 414, 81 Fed. 907. Again, in enforcing a decree, a court retains jurisdiction, even after the term, to make further orders directing the manner of its execution; and to that extent it may modify the provisions of the original decree, as by changing the times or terms of a sale of property. Mootry v. Grayson, 44 C. C. A. 83, 104 Fed. 613; Bound v. South Carolina R. Co. 55 Fed. 186; Alton Water Co. v. Brown, 92 C. C. A. 598, 166 Fed. 840; Graham v. Coolidge, 30 Tex. Civ. App. 273, 70 S. W. 231; Sinsheimer v. Simonson, 47 C. C. A. 51, 107 Fed. 905; Re Sanborn, 52 Fed. 586.

So much for the statutes and equity rules controlling the

enforcement of decrees. There is no question that a circuit court has full powers, coextensive with its jurisdiction to make decrees, to enforce them by proper process, or ancillary suits, if necessary; but in the matter of issuing attachments for the person of the defendant, either by mesne or final process, it is proper here to call your attention to sections 990 and 991 of the United States Revised Statutes, providing that no person can be arrested and imprisoned for debt on any process issuing out of the United States courts, in a State that forbids imprisonment for debt. *Re Purvine*, 37 C. C. A. 446, 96 Fed. 195. Consequently, the rules which make this provision in mesne or final process cannot be enforced in such a State, when the sole purpose of the suit is for the recovery of money, as in accounting, or for money due on any judgment or decree founded upon contract. *Nelson v. Hill*, 89 Fed. 477; *Mallory Mfg. Co. v. Fox*, 20 Fed. 409; *Low v. Durfee*, 5 Fed. 256. The first clause of equity rule 8 provides the only method by which money can be collected under a decree in equity.

## CHAPTER XCVIII.

### SALES UNDER DECREE.

You must note the special provisions of the Federal statute, act of 1893, 27 Stat. at L. 751, chap. 225, U. S. Comp. Stat. 1901, p. 710, and not pursue the State methods. *Cumberland Lumber Co. v. Tunis Lumber Co.* 96 C. C. A. 244, 171 Fed. 352. By the act above cited, it is provided that all real estate or any interest in land ordered to be sold by a decree of any United States court, must be sold at the court house of the county in which the property, or a greater part thereof, is located, or upon the premises, as the court may decree. That personal property must be sold in the same way, unless otherwise ordered. (See authorities under "Execution of Decree," also under "Enforcement of Decree.")

By section third of the act it is provided that the sale of real estate must be published at least once a week for four weeks in a newspaper published and circulating in the county where the land is situated. If the real estate is in more than one county, then notice must be published in such of the counties as the court may direct. The real estate must be described in the notice. This statute, it is declared, is for the benefit of the defendant in execution, and creates a personal privilege or right which he may insist on or waive. *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 391-393.

#### *Sale by Master.*

Whether the sale be made by the United States marshal, or the master in chancery, or a special master commissioner, the same rules must be pursued, unless otherwise directed by the decree. It must be made subject to the provisions of the act above given, and in such manner as the court may direct within the provisions of the act of 1893.

The authority upon which this ministerial duty is performed, whether by marshal or master, is the decree, a copy of which the clerk must furnish him. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 497. The decree must be strictly followed, and when the sale is made, a prompt return must be made by the officer. As to form of return of sale, see *Nevada Nickel Syndicate v. National Nickel Co.* 103 Fed. 392, 393.

### *Motion to Confirm.*

On filing the report of sale, counsel for plaintiff should make a motion to confirm the sale, but the court usually gives a reasonable time within which to file exceptions to the sale. The act being purely ministerial, no right can be claimed under equity rule 83, providing for exceptions to master's reports. *Pewabic Min. Co. v. Mason*, 145 U. S. 363, 36 L. ed. 736, 12 Sup. Ct. Rep. 887. If no exceptions are filed, the sale may on motion be confirmed, or the court may of its own motion set the sale aside. See *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 843, 844-850, for decree confirming sale. As to the practice, see *Coltrane v. Baltimore Bldg. & L. Asso.* 126 Fed. 839, 840. Anyone interested in having the sale confirmed, whether purchaser, creditor, or receiver, may make the motion. *Ibid.*

### *Exceptions to Sale.*

Any objections to the officer appointed to sell must be made by direct attack on the order appointing him. A standing master appointed to sell need not take an oath nor file a bond. *Seaman v. Northwestern Mut. L. Ins. Co.* 30 C. C. A. 212, 58 U. S. App. 632, 86 Fed. 497. Exceptions to the sale or the price, or the failure of the officer to perform a required duty, must be made specifically, and supported by affidavit, if the objection raised is not apparent in the record.

If the exceptions are sustained, a resale is ordered; if not sustained, or no exceptions are filed within the time allowed by the court, the sale will be confirmed, and the court will order the officer selling to execute and deliver a conveyance to the pur-

chaser. If any delay is occasioned in executing the deed, as where under the laws of a State a party has a right to redeem within a certain period after sale, then a certificate of the sale should be delivered to the purchaser until the period for redemption has expired. If the property has not been redeemed, a report should be made to the court, with a proper deed executed for the court's approval, and then delivered to the purchaser if approved. However, this may not be necessary where the court has anticipated the period of redemption in his approval of the sale, and ordered the master to execute and deliver the deed after the period of redemption expires without having been redeemed. Of course, if the property is redeemed, a report must be made at once for the further action of the court.

### *Effect of Bid.*

The sale, report, and confirmation are all necessary to transfer the property; a bid at the sale accepted by the master is dependent upon confirmation before it in reality becomes an accepted bid. The bid, then, is but an offer to take the property, the acceptance of which is evidenced by the confirmation by the court. *Tennessee v. Quintard*, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 835 and cases cited; *Camden v. Mayhew*, 129 U. S. 73, 32 L. ed. 608, 9 Sup. Ct. Rep. 246; *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43. When purchaser fails to complete bid he is entitled to notice of resale. *Bayne v. Brewer Pottery Co.* 90 Fed. 623; *Stuart v. Gay*, 127 U. S. 526, 32 L. ed. 193, 8 Sup. Ct. Rep. 1279; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 787; *Mayhew v. West Virginia Oil & Oil Land Co.* 24 Fed. 205.

### *Purchaser Under.*

A purchaser under a judicial sale becomes a quasi party to the suit from which the process issued, and he must take notice of all the subsequent proceedings in the cause, if any. *Tennessee v. Quintard*, 26 C. C. A. 165, 47 U. S. App. 621, 80 Fed. 835; *Davis v. Mercantile Trust Co.* 152 U. S. 594, 38

L. ed. 565, 14 Sup. Ct. Rep. 693; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950; *Stuart v. Gay*, 127 U. S. 518, 32 L. ed. 191, 8 Sup. Ct. Rep. 1279. See *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706.

*Notice of Proceedings After Decree.*

After final decree, parties to the suit are not bound to take notice of subsequent proceedings, unless served with process, or they voluntarily appear (*Smith v. Woolfolk*, 115 U. S. 147, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 336, 40 L. ed. 990, 16 Sup. Ct. Rep. 810; *Sheffield & B. Coal, Iron & R. Co. v. Newman*, 23 C. C. A. 459, 41 U. S. App. 766, 77 Fed. 793); especially when new and distinct issues from the original bill are set up. *Smith v. Woolfolk*, 115 U. S. 148, 29 L. ed. 359, 5 Sup. Ct. Rep. 1177.

## CHAPTER XCIX.

### REHEARING.

A court of equity has full power over its decrees *during the term* in which they are entered, and may vacate, modify, supplement, or supersede, as we have before seen in chapter 97 (*Doss v. Tyack*, 14 How. 312, 313, 14 L. ed. 435; *Henderson v. Carbondale Coal & Coke Co.* 140 U. S. 40, 35 L. ed. 338, 11 Sup. Ct. Rep. 691; *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799; *Goddard v. Ordway* [*Phillips v. Ordway*] 101 U. S. 752, 25 L. ed. 1043); or grant a rehearing, which is addressed to the sound discretion of the court, and cannot be reviewed or assigned as error (*McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379, 382; *Iron R. Co. v. Toledo, D. & B. R. Co.* 10 C. C. A. 319, 18 U. S. App. 479, 62 Fed. 169, and cases cited). After decree, and before term closes, you may apply for a rehearing by petition, or you may directly appeal, as will be hereafter shown. Equity rule 88; *First Nat. Bank v. Woodrum*, 86 Fed. 1004; *Giant Powder Co. v. California Vigorit Powder Co.* 6 Sawy. 527, 5 Fed. 197; *Harman v. Lewis*, 24 Fed. 530. (See "Rehearing in Appeals.")

A rehearing in equity is in effect nothing more than an application for a new trial at law, based on similar grounds and subject to the same limitations in considering evidence and errors of law and fact. *Giant Powder Co. v. California Vigorit Powder Co.* 6 Sawy. 527, 5 Fed. 201. The difference, however, is this: in equity the application for a rehearing is not an *ex parte* proceeding. *Ibid.*; *Harman v. Lewis*, 24 Fed. 530.

The party complaining must file a petition embodying the requisites of equity rule 88. *Easton v. Houston & T. C. R. Co.* 44 Fed. 9. It must contain the special matter upon which the rehearing is applied for, it shall be signed by counsel, and the facts stated must be sworn to unless apparent in the rec-

ord. McLeod v. New Albany, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379; Allis v. Stowell, 85 Fed. 481.

### *Time of Filing.*

The rule further provides for the time of filing the petition, or within which it may be filed, as follows: If the case is appealable, it must be filed by the end of the term in which the case is tried; if not appealable, the petition may be filed before the end of the next term of the court. Equity rule 88; First Nat. Bank v. Woodrum, 86 Fed. 1004; Easton v. Houston T. C. R. Co. 44 Fed. 9; Moelle v. Sherwood, 148 U. S. 25, 37 L. ed. 352, 13 Sup. Ct. Rep. 426; Newman v. Moody, 19 Fed. 858. This latter clause of the rule is not now applicable, as all the cases decided in the circuit court are appealable to the circuit court of appeals. So that now there is no exception to the rule that a petition for rehearing must be filed before the end of the term in which the decree is entered. Halsted v. Forest Hill Co. 48 C. C. A. 681, 109 Fed. 820.

### *Order to Show Cause.*

As said, the application is not *ex parte*, but the applicant should procure an order from the court requiring the adverse party to show cause at some future day why the prayer of the petition should not be granted. The adverse party may then answer the petition, and on petition and answer the application is heard. Harman v. Lewis, 24 Fed. 531.

### *Grounds of Application.*

Unless you have some new and forcible ground, such as where a mistake is palpable, or some material fact has been overlooked by the court, it is better to appeal at once. Martindale v. Waas, 3 McCrary, 637, 11 Fed. 551. It is not profitable to catch at straws, or rehash old arguments, as the result of a vast majority of these applications attest; besides, the action of the court on rehearing is not reviewable on appeal. Iron R. Co. v. Toledo, D. & B. R. Co. 10 C. C. A. 319, 18 U. S. App. 479, 62 Fed. 169; McLeod v. New Albany, 13 C. C. A.



525, 24 U. S. App. 601, 66 Fed. 379; *Rogers v. Riessner*, 34 Fed. 270. If fraud alleged, state the facts; general allegations not good. *Hicks v. Otto*, 85 Fed. 728.

### *Newly Discovered Evidence.*

Newly discovered evidence is a ground upon which to base a rehearing in equity, but in such cases the petition must contain, independently of the affidavits setting up the newly discovered evidence, the nature of the evidence; that it is material, showing in what way; the fact that it was not known until after the decree; the time and circumstances under which it came to the knowledge of the party setting it up; and that it could not have been discovered sooner by reasonable diligence. *Acme Flexible Clasp Co. v. Cary Mfg. Co.* 99 Fed. 500; *Hostetter Co. v. Comerford*, 99 Fed. 834; *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* 64 Fed. 125; *McLeod v. New Albany*, 13 C. C. A. 525, 24 U. S. App. 601, 66 Fed. 379; *Hicks v. Otto*, 85 Fed. 728; *Allis v. Stowell*, 85 Fed. 481; *Central Trust Co. v. Worcester Cycle Mfg. Co.* 91 Fed. 212; *Anderson Land & Stock Co. v. McConnell*, 171 Fed. 475; *Tilghman v. Werk*, 39 Fed. 680; *Witters v. Sowles*, 31 Fed. 5; *Vermont Farm Mach. Co. v. Converse*, 10 Fed. 825; *Rintoul v. New York C. & H. R. R. Co.* 20 Fed. 313; *Colgate v. Western U. Teleg. Co.* 22 Blatchf. 118, 19 Fed. 828.

### *Must Be Material.*

It must be material, and not cumulative (*Rogers v. Marshall*, 13 Fed. 59), and reasonably sufficient to change the result (*Torrent v. Duluth Lumber Co.* 32 Fed. 229; *Allen v. New York*, 18 Blatchf. 239, 7 Fed. 483; *Munson v. New York*, 20 Blatchf. 358, 11 Fed. 72; *Pfanschmidt v. Kelly Mercantile Co.* 32 Fed. 667; *Witters v. Sowles*, 32 Fed. 765), and not mistaken view of counsel (*Witters v. Sowles*, 31 Fed. 5).

### *On Error in Law.*

If the complaint is that the court has committed an error in  
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law, it must be shown that the particular point was not presented in argument.

*On Ground Defendant Not Represented.*

If on ground that defendant was not present, or represented by counsel on the hearing, you must show excuse, and that you have a meritorious defense. *Blair v. Silver Peak Mines*, 93 Fed. 332; *Tilghman v. Werk*, 39 Fed. 680. See *Jordan v. Brown*, —Tex. Civ. App.—, 94 S. W. 398; *Witters v. Sowles*, 31 Fed. 5.

*Effect of Granting.*

If rehearing is granted to admit additional proof, the decree should stand pending the rehearing. *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41; *Rogers v. Marshall*, 4 McCrary, 307, 15 Fed. 193. But if the rehearing is granted because the court doubts the correctness of the judgment, then the decree should be set aside until the case is reheard.

*On Interlocutory Orders.*

Rehearings cannot be granted on interlocutory orders. Equity rule 88 provides for them after final decree. *Wooster v. Handy*, 22 Blatchf. 307, 21 Fed. 51; see *Deitch v. Staub*, 53 C. C. A. 137, 115 Fed. 317; and *Gillette v. Bate Refrigerating Co.* 12 Fed. 108.

*Time for Appeal Not Included.*

If the petition for rehearing is entertained by the court, then the time for appeal is not included, while the application is pending. *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Northern P. R. Co. v. Holmes*, 155 U. S. 138, 39 L. ed. 99, 15 Sup. Ct. Rep. 28; *Kingman v. Western Mfg. Co.* 170 U. S. 678, 42 L. ed. 1193, 18 Sup. Ct. Rep. 786; *Cutting v. Tavares, O. & A. R. Co.* 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 155; *Texas & P. R. Co. v. Murphy*, 111 U. S. 489, 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 497.

*Hearing Application After the Term.*

We have seen that the jurisdiction of the court to entertain any motion affecting the judgment ends with the term (*Linder v. Lewis*, 1 Fed. 378; *Halsted v. Forest Hill Co.* 109 Fed. 822, 823); and we have seen after the term rehearing will not be entertained (*Ibid.*; *Graham v. Swayne*, 48 C. C. A. 411, 109 Fed. 367; *Williams v. Conger*, 131 U. S. 391, 33 L. ed. 201, 9 Sup. Ct. Rep. 793; *Bushnell v. Crook Min. & Smelting Co.* 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2; *Bank of Lewisburg v. Sheffey*, 140 U. S. 451, 35 L. ed. 496, 11 Sup. Ct. Rep. 755), but an exception has been recognized, where at the time the decree has been entered some order is made virtually keeping the judgment open for further relief or proceedings (*Linder v. Lewis*, 1 Fed. 380); or unless the application has been filed at the entry term, but continued over by the court until the next term for rehearing (*Graham v. Swayne*, 48 C. C. A. 411, 109 Fed. 367; *First Nat. Bank v. Woodrum*, 86 Fed. 1005; *Giant Powder Co. v. California Vigorit Powder Co.* 5 Fed. 197; *New Orleans v. Fisher*, 34 C. C. A. 15, 63 U. S. App. 455, 91 Fed. 575; *Klein v. Southern P. R. Co.* 140 Fed. 213). In this last case it is held the court must continue it over. The mere filing, without action, does not have that effect. In *Goddard v. Ordway*, 101 U. S. 745, 25 L. ed. 1040; and *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37, 37 L. ed. 988, 989, 14 Sup. Ct. Rep. 4, the above is declared the correct rule if the petition is entertained by the court, and some action, as continuing it, is taken by the court, it goes over as unfinished business. *Graham v. Swayne*, 48 C. C. A. 411, 109 Fed. 366.

*Form of Petition for Rehearing.*

You may use the form of application for a new trial in your State courts, which I assume is familiar to you, but applying strictly the requisites provided by equity rule 88, above referred to. The following may be used:

Title as in bill; addressed to the Honorable Circuit Judges of, etc.

The petition of the defendant C. D. sheweth unto your honors that, being

aggrieved by the decree entered in this cause on the.....day of....., A. D. 19..., by which petitioner was required, etc. (state substance of decree, then grounds of application), wherefore your petitioner humbly prays that your Honors will grant a rehearing, humbly submitting to such orders as the court may make if the application be without merit, etc.

R. F.,  
Solicitor, etc.

## CHAPTER C.

### BILL OF REVIEW.

Final decrees in equity may be modified or set aside by appeals within the time prescribed by law, or by a bill of review filed within the time allowed for appeals, or by an original bill in the nature of a bill of review charging fraud or newly discovered evidence. *Huntington v. Little Rock & Ft. S. R. Co.* 3 McCrary, 581, 16 Fed. 906; *Robinson v. Rudkins*, 28 Fed. 8. It is not considered a continuance of the former bill, but in the nature of an original bill. *Home Street R. Co. v. Lincoln*, 89 C. C. A. 133, 162 Fed. 133; but see *Dowagiac Mfg. Co. v. McSherry Mfg. Co.* 84 C. C. A. 38, 155 Fed. 524; contra—see also *Little Rock Junction R. Co. v. Burke*, 13 C. C. A. 341, 27 U. S. App. 736, 66 Fed. 88; *Barrow v. Huntington*, 99 U. S. 80, 25 L. ed. 407.

#### *Distinction Between Bill of Review and Rehearing.*

There is a distinction between a bill of review and an application for rehearing, which I have already discussed, and the distinction when stated will be a sufficient explanation of the nature of a bill of review.

First. A rehearing is not appealable, and you may appeal from an adverse decision on a bill of review.

Second. You can attack in a rehearing the conclusions of law and fact, whereas in a bill of review you can only attack errors apparent upon the face of the record.

Third. The application for a rehearing must be filed before the end of the entry term, whereas a bill of review may be filed after the term and within the time an appeal may be taken under the statute. *Copeland v. Bruning*, 104 Fed. 170; *Reed v. Stanly*, 38 C. C. A. 331, 97 Fed. 521.

According to the practice in this country a final decree is deemed to be enrolled at the end of the term. *Whiting v. Bank of United States*, 13 Pet. 13, 10 L. ed. 36.

*For What Bill of Review Lies.*

- First. For error apparent in the record.
- Second. For new matter arising since the decree.
- Third. Newly discovered evidence after the term.
- Fourth. For fraud in procuring the decree.

*First. For Error Apparent.*

Where an error is apparent on the face of the decree, or in the pleadings or proceedings, and without reference to the evidence, you may correct it by a bill of review. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Home Street R. Co. v. Lincoln*, 89 C. C. A. 133, 162 Fed. 133; *Reed v. Stanly*, 89 Fed. 430; *Irwin v. Meyrose*, 2 McCrary, 244, 7 Fed. 533; *Quinton v. Neville*, 81 C. C. A. 673, 152 Fed. 879; *Allen v. Wilson*, 21 Fed. 884; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 33; *Cocke v. Copenhagen*, 61 C. C. A. 211, 126 Fed. 145. Mr. Daniels in his *Chancery Practice* says that the error in law which will maintain a bill of review must consist of the violation of some statute, or established principle of law or equity, or of the settled practice of the court. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Freeman v. Clay*, 2 C. C. A. 587, 2 U. S. App. 254, 52 Fed. 7, and authorities cited. It must be apparent from the proceedings, pleadings, and decree, without reference to the evidence. *Ibid.* This view has been adopted by the Federal courts in passing upon applications for bills of review. *Bufington v. Harvey*, 95 U. S. 99, 24 L. ed. 381; *Acord v. Western Pocahontas Corp.* 156 Fed. 989; *Freeman v. Clay*, 2 C. C. A. 587, 2 U. S. App. 254, 52 Fed. 7; *Hoffman v. Knox*, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 490; *Putnam v. Day*, 22 Wall. 65, 22 L. ed. 765; *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 106.

The error must be on the face of the record proper, and not error claimed in the conclusions of law, which is simply a mistake of judgment. *Ibid.*; *Shelton v. Van Kleeck*, 106 U. S. 534, 27 L. ed. 270, 1 Sup. Ct. Rep. 491; *Quinton v. Neville*, 81 C. C. A. 673, 152 Fed. 879; *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 643, 19 Fed. 347; *Reed v. Stanly*, 89

Fed. 430. If the decree is consistent with the record, without considering the evidence, a bill of review will not be allowed. You must appeal to have the evidence considered as a means of correction. *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 106; *Acord v. Western Pocahontas Corp.* 156 Fed. 989.

*Second. New Matter Arising Since the Decree.*

Whatever the new matter may be upon which you base your application for review, it must have arisen *after* the rendition of the decree. *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Camp Mfg. Co. v. Parker*, 121 Fed. 195. A change by the Supreme Court of its ruling on a question of law and fact is not such new matter as will sustain a bill of review. *Tilghman v. Werk*, 39 Fed. 680; *King v. Dundee Mortg. & Trust Invest. Co.* 28 Fed. 33. If not error of law, it must be newly discovered evidence to bring the bill. *Irwin v. Meyrose*, 2 McCrary, 244, 7 Fed. 533; *Beard v. Burts*, 95 U. S. 436, 24 L. ed. 486.

*Third. On Ground of Newly Discovered Evidence After the Term.*

I have already discussed newly discovered evidence as a basis for a rehearing during the term, but after the decree. Where the evidence has been discovered *after* the term and within the time in which a bill of review may be filed, you may make it a basis for a revision of the decree. It must be shown that it was evidence not known, and could not with reasonable diligence have been found before the term expired. *Kelley Bros. v. Diamond Drill & Match Co.* 142 Fed. 868; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364; *Acord v. Western Pocahontas Corp.* 156 Fed. 989; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Birdsboro Steel Foundry & Mach. Co. v. Kelley Bros.* 78 C. C. A. 101, 147 Fed. 713; *Novelty Tufting Mach. Co. v. Buser*, 85 C. C. A. 413, 158 Fed. 83, 84, 14 A. & E. Ann. Cas. 192; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 652; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 781; *Jorgenson v. Young*, 69 C. C. A. 222, 136 Fed. 381. In addition you must show that

the evidence or new matter is material, and not cumulative, but if cumulative, it is highly pertinent and controlling in its influence. *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 103; *Keith v. Alger*, 59 C. C. A. 552, 124 Fed. 35; *Craig v. Smith*, 100 U. S. 234, 25 L. ed. 580. New matter, new evidence, and new witnesses simply for impeaching will not be sufficient. *Ibid.*; *United States v. Throckmorton*, 98 U. S. 65, 66, 25 L. ed. 95. Nor when hearsay or otherwise inadmissible. *Ward v. Ward*, 79 C. C. A. 162, 149 Fed. 204. Nor that new evidence would show the decree technically erroneous, but it must further appear that the party has been deprived of a substantial right. *Keith v. Alger*, 59 C. C. A. 552, 124 Fed. 32.

*Fourth. For Fraud in Procuring the Decree.*

A bill of review will lie for fraud where the fraud alleged was extrinsic to the matters tried, and not fraud raised in the issues, such as fraud practised upon the party, or the court during the trial, or in obtaining the judgment. *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364; *Reed v. Stanly*, 89 Fed. 431; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 807; *Kimberly v. Arms*, 40 Fed. 549-558; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 786; *Graver v. Faurot*, 64 Fed. 243, S. C. 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 262; *Terry v. Commercial Bank*, 92 U. S. 454-456, 23 L. ed. 620, 621.

Where the fraud arose in procuring the decree it must be attacked by an original bill and independent litigation. *Dowagiac Mfg. Co. v. McSherry Mfg. Co.* 84 C. C. A. 38, 155 Fed. 524. See *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778, and *United States v. Beebe*, 34 C. C. A. 321, 92 Fed. 244; *Setting Aside Decree for Fraud*, chapter 101. As to allegations in bill, see *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 782; *White v. Crow*, 110 U. S. 184, 28 L. ed. 113, 4 Sup. Ct. Rep. 71; *Kimberly v. Arms*, 40 Fed. 558.

*Accident, Mistake or Surprise.*

(See Chapter 101.)



*Bill Must Show Why Decree Not Performed.*

It is a rule that a bill of review will not be allowed if performance of the decree, or a sufficient reason why it has not been performed, has not been shown, and if not alleged in the bill, it is demurrable. *Kimberly v. Arms*, 40 Fed. 548; *Ricker v. Powell*, 100 U. S. 108, 25 L. ed. 528; *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 643, 19 Fed. 347. But see *Davis v. Speiden*, 104 U. S. 84, 85, 26 L. ed. 660, 661, when the court may disregard the requirement. If the decree has not been performed, it must ask that the bill be allowed without performance, and especially when it can be shown, or is shown, that the performance would render nugatory the relief sought by the bill of review. *Ibid.*; *Kimberly v. Arms*, 40 Fed. 555; *Hoffman v. Knox*, 1 C. C. A. 535, 8 U. S. App. 19, 50 Fed. 484. The rule, however, would not apply if the decree does not require the party to do anything. *Hobbs v. State Trust Co.* 15 C. C. A. 604, 30 U. S. App. 393, 68 Fed. 618.

*Time of Filing a Bill of Review.*

Leave to file a bill of review can only be obtained from the court in which the decree was rendered and enrolled. *Camp Mfg. Co. v. Parker*, 121 Fed. 195. The time within which a bill of review should be filed is not fixed by statute or rule, but the courts, by analogy, require the bill to be filed within the time allowed by the statute for appeals, and *not after*. *Ibid.*; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364; *Reed v. Stanly*, 89 Fed. 431; *Jorgenson v. Young*, 69 C. C. A. 222, 136 Fed. 381; *Cocke v. Copenhaver*, 61 C. C. A. 211, 126 Fed. 145; *Halsted v. Forest Hill Co.* 109 Fed. 823; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 827; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 32; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 804; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 227, 34 L. ed. 105, 10 Sup. Ct. Rep. 736.

In cases of fraud it is governed by the rule of laches, and the bill should show when the fraud was discovered. *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364. And when it af-

firmatively appears that the bill was not filed within the period limited for appeals, it is subject to a demurrer; otherwise the issue must be raised by answer to the bill. *Ibid.*; *Copeland v. Bruning*, 104 Fed. 169.

The rule as above stated applies, without exception, where errors appear in the decree or proceedings, because it should be brought within the time in which error could be appealed from. *Taylor v. Charter Oak L. Ins. Co.* 3 McCrary, 484, 17 Fed. 566; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 32; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 804; *Reed v. Stanly*, 89 Fed. 433; *Dunlevy v. Dunlevy*, 38 Fed. 462; *McDonald v. Whitney*, 39 Fed. 467; *Camp Mfg. Co. v. Parker*, 121 Fed. 195. But when founded on new matter or newly discovered evidence, then the review will be allowed, if filed within a reasonable time after discovery. *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Acord v. Western Pocahontas Corp.* 156 Fed. 989. It is largely a question of diligence. *Kissinger-Ison Co. v. Bradford Belting Co.* 59 C. C. A. 221, 123 Fed. 91.

The time for filing a bill of review when based on error apparent being controlled by analogy to the statute giving a certain time for appeal, the rule would be that if the right of appeal lies to the circuit court of appeals, then by the act of March 3, 1891, six months is allowed; but if the right of appeal lies from the circuit to the Supreme Court under section 5 of the act of 1891, then you may sue out a bill of review within two years, that being the time limited for such appeals by U. S. Rev. Stat. sec. 1008, U. S. Comp. Stat. 1901, p. 715, provided, however, that the circuit court certifies within the term that the jurisdiction of the circuit court is involved. Upon failure to so certify there is no right of appeal, and consequently no right to a bill of review. *Reed v. Stanly*, 97 Fed. 521; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 837; *Chamberlin v. Peoria, D. & E. R. Co.* 55 C. C. A. 54, 118 Fed. 33; *Taylor v. Easton*, 103 C. C. A. 509, 180 Fed. 364.

### *Leave of Court to File.*

Where the application for a bill of review is based on error apparent in the decree or the proceedings, it may be filed as of

right without leave of the court. *Acord v. Western Pocahontas Corp.* 156 Fed. 989-996; *Ricker v. Powell*, 100 U. S. 104, 25 L. ed. 527; *Camp Mfg. Co. v. Parker*, 121 Fed. 195; *Ritchie v. Burke*, 109 Fed. 16; *Copeland v. Bruning*, 104 Fed. 170; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809; *Thompson v. Schenectady R. Co.* 119 Fed. 638. It is regarded as in the nature of a writ of error; so also when filed to set aside for fraud, (*Ritchie v. Burke*, 109 Fed. 16; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 807); but when based on newly discovered facts *dehors* the record, then permission to file the bill must be granted by the court (*Acord v. Western Pocahontas Corp.* 156 Fed. 995; *Ricker v. Powell*, 100 U. S. 107, 25 L. ed. 528; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809; *Camp Mfg. Co. v. Parker*, 121 Fed. 196); and it rests entirely in the court's discretion (*Thomas v. Brockenbrough*, 10 Wheat. 151, 6 L. ed. 289; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 808. See *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 226, 34 L. ed. 104, 10 Sup. Ct. Rep. 736).

When the bill rests partly on grounds requiring leave to file and partly on errors of law, leave to file must be granted, or a motion to dismiss the bill will be allowed, as it must be treated as a whole. *Kimberly v. Arms*, 40 Fed. 558; *Ricker v. Powell*, 100 U. S. 109, 25 L. ed. 528.

Leave to file a bill of review must be obtained from the court rendering the decree. *Camp Mfg. Co. v. Parker*, 121 Fed. 195.

### *Not Appealable.*

When the granting of a bill of review is discretionary, the granting or refusing it is not appealable, but proceedings after granting are. *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 808, 809.

### *Form to Be Used.*

Title as in bill; address to the Circuit Judges for.....District of .....

Applicant (as plaintiff) vs. all other parties to the original suit as defendants.

Your petitioner would show unto your Honors that on the.....day of ....., A. D. 19..., C. D. hereinafter styled defendant, exhibited his bill of complaint in the United States Circuit Court for the.....District of..... against your petitioner, and therein he alleged (state substance of bill).

That your petitioner appeared and answered said bill on the.....day of....., A. D. 19..., as follows (here state substance of answer); that issue was joined and proof taken and the cause heard on the..... day of....., A. D...., when a decree was rendered and recorded in said cause as follows (here insert decree)

Your petitioner here shows unto your Honors that said decree is erroneous and it would be inequitable to permit it to stand as entered in this cause for that (here insert errors complained of).

That no decree should have been rendered, but the bill should have been dismissed.

That in consideration of the error thus apparent your petitioner prays that it be reviewed and reversed, and no further proceedings taken thereon. To the end, therefore, that the defendant may show cause why the petitioner should not have the relief prayed for, your petitioner prays that a subpoena be directed to the said C. D., defendant, commanding him at a certain time to show cause why the decree should not be reviewed and reversed as prayed for.

R. F.,  
Solicitor, etc.

Swear to the petition as follows:

I, A. B., plaintiff in the foregoing petition for review, being duly sworn, say that I have read the same and that the matters and things set forth therein are true.

A. B.,  
Plaintiff.

Sworn to before me this.....day of....., A. D. 19...

Notary.

If the petition rests upon new matter arising since the decree, or newly discovered evidence, you must set forth that:

Since the time of rendering and recording the decree, you have discovered new matter, or new evidence material to the case, which is as follows: (Here insert specifically the new matter or the new evidence discovered, with averments to show materiality. If new evidence, attach, if possible, the affidavits of the newly discovered witnesses, showing the new evidence and show specifically that you were not in default in discovering the evidence sooner.) Then proceed—

Wherefore said decree should be reviewed, reversed, and set aside, and to the end that plaintiff should be permitted to prove the matter aforesaid, he prays process of subpoena, etc.

If the decree is such that you are required to perform some act, etc., set up why you have not done so as has been previously stated.

### *Parties to Bills of Review.*

The rule is that all parties to the original suit must be made parties to a bill of review. The applicant is plaintiff, and all other parties are defendants, if necessary parties. *King v. Dundee Mortg. & T. Invest. Co.* 28 Fed. 33; *Frankfort v. Deposit Bank*, 120 Fed. 167, 168; *Perkins v. Hendryx*, 127 Fed. 448; *Thompson v. Maxwell Land-Grant & R. Co.* 95 U. S. 397, 24 L. ed. 483. However, if codefendants were not necessary parties in the original bill they may be omitted. *Id.*

### *Who May Attack Decree.*

Creditors appearing before a master in a creditors' suit, who have filed intervening petitions to prove their claims, become parties to the record, and may attack the decree by petition (*Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 171); but not parties brought into appellate proceedings by citation, who do not avail themselves of the opportunity of appeal. *Ibid.*

A party accepting the benefit of a decree cannot review it (*Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 654), or where he disclaims interest. *Brigham City v. Toltec Ranch Co.* 41 C. C. A. 222, 101 Fed. 85.

### *Bill of Review After Appeal.*

A bill of review will not be sustained if an appeal has been applied for and allowed, but not an attempted appeal when there was no right of appeal, if bill of review is filed in time. *Ensminger v. Powers*, 108 U. S. 302, 303, 27 L. ed. 736, 2 Sup. Ct. Rep. 643; *Kimberly v. Arms*, 40 Fed. 548-551; *Blythe Co. v. Hinckley*, 49 C. C. A. 647, 111 Fed. 838, 839. However, such appeal does not operate to suspend the time in which the bill of review should have been sued out (*Ibid.*; see *Ensminger v. Powers*, 108 U. S. 302, 27 L. ed. 736, 2 Sup.

Ct. Rep. 643), nor can it be brought in the circuit court after the case has been passed upon by the appellate court (Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 99 Fed. 171-175; Central Trust Co. v. Evans, 19 C. C. A. 563, 43 U. S. App. 214, 73 Fed. 562; Southard v. Russell, 16 How. 547-570, 14 L. ed. 1052-1062; Camp Mfg. Co. v. Parker, 121 Fed. 195; Durant v. Essex Co. (Durant v. Storrow) 101 U. S. 555, 25 L. ed. 961; Franklin Sav. Bank v. Taylor, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 866; Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 809; see Watson v. Stevens, 53 Fed. 31, as to granting right in mandate; Kingsbury v. Buckner, 134 U. S. 671, 33 L. ed. 1055, 10 Sup. Ct. Rep. 638); but you may apply to the appellate court for permission to file a bill of review (Novelty Tufting Mach. Co. v. Buser, 85 C. C. A. 413, 158 Fed. 83, 14 A. & E. Ann. Cas. 192; Camp Mfg. Co. v. Parker, 121 Fed. 195; Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. 74 C. C. A. 521, 143 Fed. 321; Society of Shakers v. Watson, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; Seymour v. White County, 34 C. C. A. 240, 92 Fed. 115; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 781; Frankfort v. Deposit Bank, 120 Fed. 165; McClintock v. Pawtucket, 180 Fed. 320); and this may be done after case is affirmed and mandate issued, if based on newly discovered evidence (Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. 74 C. C. A. 521, 143 Fed. 321; Municipal Signal Co. v. Gamewell Fire Alarm Teleg. Co. 77 Fed. 452; Re Gamewell Fire Alarm Teleg. Co. 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 785).

It was held, however, in *Rector v. Fitzgerald*, 8 C. C. A. 277, 19 U. S. App. 423, 59 Fed. 808-811, that the pending application for a bill of review was not so far *lis pendens* as to affect a sale under the decree, when sold in good faith by the successful party.

While a bill of review will not lie after an appeal, except with the permission of the appellate court, yet an original bill in the nature of a bill of review may be filed in the court in which the original judgment was obtained, without permission, when sought to be set aside for fraud (*Ritchie v. Burke*, 109

Fed. 16, and see *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 786), if the fraud was practiced upon the court, or the party during the trial, and not involved in the subject-matter of the litigation, or the issues that were tried. See *Graver v. Faurot*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 257; *Marshall v. Holmes*, 141 U. S. 596-599, 35 L. ed. 872-874, 12 Sup. Ct. Rep. 62.

*Who to Determine Application.*

When an order of the circuit court of appeals stays the mandate the case is kept in the jurisdiction of that court (*Burget v. Robinson*, 59 C. C. A. 260, 123 Fed. 262), and the leave to file a bill of review in the court below must be made to the circuit court of appeals, but the court below must determine the application on its merits. *Frankfort v. Deposit Bank*, 59 C. C. A. 539, 124 Fed. 18.

After mandate is sent down it should be tried in the circuit court of appeals unless facts arose in the court below after mandate, in which case, for convenience, the circuit court of appeals will require the court below to hear it. *Keith v. Alger*, 59 C. C. A. 552, 124 Fed. 32.

## CHAPTER CL.

### VACATING DECREE.

No rule is better settled than that a Federal court cannot vacate a decree after the term, except in equity upon bills of review, or upon writs of error coram vobis in cases at law (*Allen v. Wilson*, 21 Fed. 881; *Morgans's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530, and cases cited; *McGregor v. Vermont Loan & T. Co.* 44 C. C. A. 146, 104 Fed. 709; *Bronson v. Schulten*, 104 U. S. 410, 26 L. ed. 797; *Austin v. Riley*, 55 Fed. 833; *Doe v. Waterloo Min. Co.* 60 Fed. 643; *Petersburgh Sav. & Ins. Co. v. Dellatorre*, 17 C. C. A. 310, 30 U. S. App. 504, 70 Fed. 645; *Manning v. German Ins. Co.* 46 C. C. A. 144, 107 Fed. 53; *Farmers' Loan & T. Co. v. Iowa Water Co.* 80 Fed. 467; *Craven v. Canadian P. R. Co.* 62 Fed. 171; *Mootry v. Grayson*, 44 C. C. A. 83, 104 Fed. 613; *Wetmore v. Karrick*, 205 U. S. 141, 51 L. ed. 745, 27 Sup. Ct. Rep. 434; *Pollitz v. Wabash R. Co.* 180 Fed. 951), unless for want of jurisdiction (*Pollitz v. Wabash R. Co.* 180 Fed. 951), or unless a motion to vacate was made at the term in which the decree was entered, and continued over by the court (*Stuart v. St. Paul*, 63 Fed. 644; *Graham v. Swayne*, 48 C. C. A. 411, 109 Fed. 366; *Amy v. Watertown*, 130 U. S. 313, 32 L. ed. 950, 9 Sup. Ct. Rep. 530), or unless for fraud, as before stated.

(See Fraud in Procuring Decree, chapter 100.)

After the circuit court of appeals has affirmed the decree, the circuit court cannot entertain a bill to modify or vacate it. (See "Bill of Review.") *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 171; *Re Sanford Fork & Tool Co.* 160 U. S. 255, 40 L. ed. 416, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 266, 41 L. ed. 995, 17 Sup. Ct. Rep. 520; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 552; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910;



Walker v. Brown, 86 Fed. 365; Illinois ex rel. Hunt v. Illinois C. R. Co. 34 C. C. A. 138, 91 Fed. 957.

*Setting Aside Decree for Fraud.*

When the fraud alleged is extrinsic to the matters tried, such as when practised upon the court, or a party whereby his case was not fully presented, a bill of review will lie; but the question has arisen whether by an original bill, or a bill in the nature of a bill of review, you can set aside a decree for fraud, which consisted in false swearing and perjury by witnesses in the case. Graver v. Faurot, 64 Fed. 241, 242. In considering this case the court calls attention to a distinct conflict between the Throckmorton Case, in 98 U. S. 61, 25 L. ed. 93, and the case of Marshall v. Holmes, in 141 U. S. 598, 35 L. ed. 873, 12 Sup. Ct. Rep. 62.

In the former case it was decided that only when the fraud is of such a character that it is apparent that there was no real contest or hearing of the case by reason of it, will the bill be maintained; and that a judgment founded on a fraudulent instrument, as in the case at bar, or on perjury or false swearing, could not be set aside by an original bill, or a bill in the nature of a bill of review.

In Marshall v. Holmes the judgment was obtained on an alleged forged and false instrument, and the court entertained an original bill to set the judgment aside. The court says: "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or was prevented from doing so by fraud or accident unmixed with negligence, will justify an application to chancery." Perry v. Johnston, 95 Fed. 323-325.

The principle announced is undoubtedly correct, but clearly not applicable to the facts of the case at bar as a ground to sustain an original bill to set the judgment aside. Several efforts seem to have been made to get the Supreme Court to settle the conflict, but it declined to do so. (See "Fraud in Procuring Decree," chapter 100.) Graver v. Faurot, 162 U. S. 436, 40 L. ed. 1031, 16 Sup. Ct. Rep. 799.

In Graver v. Faurot, 64 Fed. 241, the judgment was at-  
S. Eq.—41.

tacked on the ground that it was procured by false swearing and perjury, and the court, unable to reconcile the cases, followed the Throckmorton Case.

In *United States v. Gleeson*, 33 C. C. A. 272, 62 U. S. App. 311, 90 Fed. 778, a case arose where the judgment was sought to be set aside on the ground that it was procured by perjury, and the court followed the Throckmorton Case and dismissed the bill. *Brooks v. O'Hara*, 8 Fed. 533; *Kimberly v. Arms*, 40 Fed. 558; *Vance v. Burbank*, 101 U. S. 519, 25 L. ed. 931; *United States v. Throckmorton*, 98 U. S. 66, 25 L. ed. 95; *Holton v. Davis*, 47 C. C. A. 246, 108 Fed. 150.

In these cases it seems settled that a decree will not be set aside upon the attack of one of the parties to it by an original bill, or a bill in the nature of a bill of review, upon the ground of fraud in procuring it, unless the fraud is extrinsic or collateral. *Ibid.*; *Nelson v. Meehan*, 12 L.R.A.(N.S.) 374, 83 C. C. A. 597, 155 Fed. 9; *United States v. Beebe*, 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371; *Bailey v. Williford*, 126 Fed. 803, Same Case, 69 C. C. A. 226, 136 Fed. 382; *National Surety Co. v. State Bank*, 61 L.R.A. 394, 56 C. C. A. 657, 120 Fed. 593; *Graver v. Faurot*, 22 C. C. A. 156, 46 U. S. App. 268, 76 Fed. 260; *United States v. White*, 9 Sawy. 125, 17 Fed. 562; *Reed v. Stanly*, 89 Fed. 433; *Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 46 C. C. A. 639, 107 Fed. 786; *United States v. Minor*, 26 Fed. 672; *Andes v. Millard*, 70 Fed. 517.

### *Bill to Impeach Consent Decree.*

A bill will not lie to impeach a consent decree (*Thompson v. Maxwell Land Grant & R. Co.* 95 U. S. 391, 24 L. ed. 481), unless consent without authority. (*White v. Joyce* [*White v. Miller*] 158 U. S. 147, 39 L. ed. 928, 15 Sup. Ct. Rep. 788; but see *Craven v. Canadian P. R. Co.* 62 Fed. 171).

### *On Ground of Mistake or Accident.*

A circuit court may entertain a bill to set aside a decree on the ground of mistake, accident, or surprise, though the time for appeal or bill of review has passed. (See *Dewey v. Strat-*

ton, 52 C. C. A. 135, 114 Fed. 179; Perkins v. Hendryx, 149 Fed. 526; S. C. 52 C. C. A. 435, 114 Fed. 801-814-821; Brown v. Buena Vista County, 95 U. S. 157, 24 L. ed. 422; Pittsburgh, C. C. & St. L. R. Co. v. Keokuk & H. Bridge Co. 46 C. C. A. 639, 107 Fed. 786; Marshall v. Holmes, 141 U. S. 589, 25 L. ed. 870, 12 Sup. Ct. Rep. 62; Nelson v. First Nat. Bank, 70 Fed. 526), but not after nine years (Hendryx v. Perkins, 52 C. C. A. 435, 114 Fed. 801).

### *Third Party Impeaching Decree.*

One not a party to a suit may, with leave of the court, attack by original bill in the nature of a bill of review, a judgment or decree obtained by the fraud of one of the parties, if it affects his interests (Thompson v. Schenectady R. Co. 119 Fed. 634-638; Richardson v. Loree, 36 C. C. A. 301, 94 Fed. 375; See Sage v. Central R. Co. 93 U. S. 419, 23 L. ed. 935; Wood v. Davis, 108 Fed. 130; Cutter v. Iowa Water Co. 96 Fed. 777); and it is discretionary with the judge to whom application is made to require, or not, notice to the defendant (Thompson v. Schenectady R. Co. 119 Fed. 638).

Evidence that false testimony was produced and used knowingly in the trial would not of itself be sufficient, unless it appears with reasonable certainty that but for the perjury the judgment would not have been obtained (Wood v. Davis, 108 Fed. 130); that is, it must appear that the judgment or decree had no other ground to sustain it but the false evidence or fraud perpetrated (Holton v. Davis, 47 C. C. A. 246, 108 Fed. 150).

## CHAPTER CII.

### APPEAL.

We have reached a point in the case when effort in the lower court is at an end, and you must now appeal.

#### *Two Methods.*

There are two methods by which causes are taken to the higher courts for revision.

First. By appeal.

Second. By writ of error.

Appeal is the method by which equity cases are reviewed (Thomson v. Travelers' Ins. Co. 89 C. C. A. 61, 161 Fed. 868; Files v. Brown, 59 C. C. A. 403, 124 Fed. 133; Frankfort v. Deposit Bank, 62 C. C. A. 492, 127 Fed. 814, and cases cited; Carino v. Insular Government, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Nelson v. Lowndes County, 35 C. C. A. 419, 93 Fed. 538; Jabine v. Oates, 115 Fed. 862; Tæg v. Suffert, 92 C. C. A. 577, 167 Fed. 125), while a writ of error applies to cases on the law side of the court. In the former—that is, by appeal—the whole case, both law and fact, is taken up for examination on its merits; while by the latter only points of law can be reviewed (Dower v. Richards, 151 U. S. 663, 38 L. ed. 307, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 246, 41 L. ed. 988, 17 Sup. Ct. Rep. 581), except that in cases where appeals are allowed directly from a State court to the Supreme Court of the United States, the cause, whether in law or equity, is taken up on a writ of error from the Supreme Court (Dower v. Richards, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 175), and the question must be one of law, and not of fact.

The appeal, then, being the only mode by which a decree in chancery can be carried from an inferior Federal court to the appellate courts for re-examination on its merits, I shall only discuss appeals, and not writs of error, except as this method of appeal may incidentally arise.

### *Acts Governing Appeals.*

On March 3, 1891, the existing Federal system governing appeals was established. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547, Title "Judiciary."

It was an act entitled an act to establish circuit courts of appeal, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Under this act a circuit court of appeals was created in each circuit, and the appellate jurisdiction established as follows:

By section 5 it is provided that appeals or writs of error may be taken from the district courts, or from the existing circuit courts to the Supreme Court *direct*, in the following cases (Ibid.; sec. 5, p. 549):

First. When the jurisdiction of the lower court is in issue, in which case the question of jurisdiction alone shall be *certified* to the Supreme Court from the court below for decision.

Fourth. In any case that involves the construction or application of the Constitution of the United States.

Fifth. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

Sixth. In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

These clauses of the act of 1891 extended the act of February 25, 1889, authorizing appeals from the circuit to the Supreme Court without reference to amount when the jurisdiction of the circuit court was involved. See U. S. Stat. at L. vol. 25, p. 693, chap. 236, or U. S. Comp. Stat. 1901, p. 549.

### *Appeal From State Courts.*

It is further provided in the act, that nothing therein con-

tained shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of the State, nor of the statute providing for a review of such cases. U. S. Rev. Stat. sec. 709, 710, 1003, U. S. Comp. Stat. 1901, pp. 575, 576, 713.

### *Circuit Court of Appeals.*

These sections thus provide for a direct appeal to the Supreme Court of the United States from the circuit and district courts, under the special conditions therein named, and section 6 of the act provides that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error *final* decisions in the district and circuit courts of the United States *in all cases other than* provided for in the above sections, unless otherwise provided by law.

### *Final Appellate Jurisdiction of Circuit Court of Appeals.*

Section 6 then proceeds to give to the circuit court of appeals *final appellate* jurisdiction in all cases in which the jurisdiction of the circuit courts depended entirely on diversity of citizenship, or between aliens and citizens of the United States; also when the cases arise under the patent laws, revenue, and criminal laws, and in admiralty cases. Here note the fact, that to be *final* in the circuit court of appeals the jurisdiction of the lower court must rest *entirely* on diversity, etc.; if there be any other ground besides diverse citizenship, or grounds stated in said section, the jurisdiction of the circuit court of appeals is not final. *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 249, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; see also *Sonnenhiel v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233; *Huguley Mfg. Co. v. Galt Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Harding v. Hart*, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 846; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Northern P. R. Co. v. Amato*, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

While the appellate jurisdiction of the circuit court of appeals is final, so far as the parties to the litigation are concerned, yet it is specially provided in section 6 that the circuit court of appeals may certify any question to the Supreme Court concerning which it desires instruction, or the Supreme Court may require any case made final in said circuit court of appeals, by certiorari or otherwise, to be certified to the said court for its review and determination.

See section 128, chapter 6, New Code, embodying section 6 of the act of 1891.

### *Appeal from Circuit Court of Appeals to Supreme Court.*

In all cases that are carried to the circuit court of appeals, in which its appellate jurisdiction is not final, there shall be by right, an appeal, or writ of error, or review of the case by the Supreme Court, where the matter in controversy shall exceed one thousand dollars, besides costs; and one year, and no more, from the entry of the order, judgment or decree, is given in which to take the appeal. Northern P. R. Co. v. Amato, 144 U. S. 471, 472, 36 L. ed. 508, 509, 12 Sup. Ct. Rep. 740.

As to appeals in bankruptcy, see Dodge v. Norlin, 66 C. C. A. 425, 133 Fed. 363. See New Code, sec. 252, chap. 10. Also see p. 769.

### *Appeal from Interlocutory Order.*

By section 7 of the act of 1891, a new feature was added to the appellate system of the United States (Marden v. Campbell Printing-Press & Mfg. Co. 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 811); that is, an appeal in equity is permitted from an interlocutory order *granting* or *continuing* an injunction during the progress of the cause in all cases in which an appeal would lie from the final decrees to the circuit court of appeals. Ibid.; 26 Stat. at L. 828, chap. 517; U. S. Comp. Stat. 1901, p. 550—Title Judiciary; Northern P. R. Co. v. Pacific Coast Lumber Mfrs. Asso. 91 C. C. A. 39, 165 Fed. 1; Union P. R. Co. v. Oregon & W. Lumber Mfrs. Asso. 91 C. C. A. 51, 165 Fed. 13; Taylor v. Breese, 90 C. C. A. 558, 163 Fed. 679-686. Interlocutory order defined in Taylor v. Breese, *supra*, p. 684.

By sections 13 and 15 of the act the appellate jurisdiction of the Supreme and Circuit Court of Appeals over the Territorial courts is provided for.

TIME WITHIN WHICH TO TAKE AN APPEAL.

*Appeals to the Supreme Court.*

Section 5 of the act of 1891 enumerates the cases in which an appeal may be taken direct from the circuit and district courts to the Supreme Court of the United States. The time for an appeal in these cases is fixed by the old law, U. S. Rev. Stat. sect. 1008, U. S. Comp. Stat. 1901, p. 715, at two years from the entry of the decree, judgment, or order, saving disabilities, in which cases the period begins to run after the disability is removed. See *Danville v. Brown*, 128 U. S. 503, 32 L. ed. 507, 9 Sup. Ct. Rep. 149.

In prize cases an appeal must be sued out in thirty days from the rendition of the decree, unless time is extended or the Supreme Court authorizes the appeal after the time. U. S. Rev. Stat. sec. 1006, 1009, 4636.

*From Circuit Court of Appeals to the Supreme Court.*

By section 6 of the act of 1891 an appeal must be sued out of the circuit court of appeals to the Supreme Court within *one* year after the entry of the order or decree sought to be reviewed, in all cases in which the decision of the circuit court of appeals is not made final.

*'Appeals from Highest Court of State to Supreme Court of the United States.*

'Appeals from the highest court of a State to the Supreme Court must be sued out within two years from the entry of the decree. U. S. Rev. Stat. secs. 1008, 709.

*'Appeals to Circuit Court of Appeals.*

By section 11 of the act of 1891 no appeal can be sued out



to the circuit court of appeals, authorized by section 6 of the same act, except within six months after the entry of the decree.

By section 7 of the act of 1891 appeals from interlocutory orders *granting* or *continuing* an injunction are allowed, provided they are taken within thirty days from the entry of the decree or order.

There are other shorter terms of appeal provided by special acts, as by section 16 of the interstate commerce act, by which an appeal is required to be taken within twenty days from the judgment, but a review of these acts is not necessary to my purpose.

I have thus given the material features of the act of 1891, establishing the circuit court of appeals and regulating appellate jurisdiction over the inferior courts, and of which act it has been said by the Supreme Court of the United States "that it is so variant, and its provisions so comprehensive, that it must be taken as a substitute for all former acts governing appeals, and may be considered as furnishing the exclusive rules in respect to the appellate jurisdiction of the Federal courts." *The Habana*, 175 U. S. 684, 44 L. ed. 322, 20 Sup. Ct. Rep. 290; *Fisk v. Henarie*, 142 U. S. 459-468, 35 L. ed. 1080-1082, 12 Sup. Ct. Rep. 207.

## CHAPTER CIII.

### PRACTICE AS TO APPEALS.

By the latter clause of section 11 of the act of 1891, 26 Stat. at L. 829, chap. 517; U. S. Comp. Stat. 1901, p. 552, it is provided that all provisions of law now in force regulating the method and system of review through appeals or writs of error shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds and allowance of appeals. As to the laws in force and referred to, see U. S. Rev. Stat. from sec. 997 to sec. 1013, inclusive; U. S. Comp. Stat. 1901, pp. 712 to 716; see also the rules of the Supreme Court and circuit court of appeals. The various provisions of the statutes and rules referred to will be discussed as we proceed; and first:

#### *As to Appeals from Interlocutory Decrees.*

We have seen, in stating the provisions of the act of 1891, that the appellate jurisdiction is now divided between the Supreme Court and the circuit court of appeals (*McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118), the division being clearly defined. We have seen also that there are two kinds of decrees from which an appeal may be taken, which was a new departure in the practice of the Federal courts.

First. Interlocutory decrees.

Second. Final decrees.

And the rule may be stated thus: The appellate jurisdiction of the circuit court of appeals is restricted to reviewing *final* decrees, with the single exception of the power to review interlocutory orders *granting* or *continuing* an injunction (*Robinson v. Belt*, 5 C. C. A. 521, 12 U. S. App. 431, 56 Fed. 328), or appointing receivers, added by act of June 6, 1900.

## INTERLOCUTORY DECREES.

*Acts Governing Appeals.*

To understand the decisions under section 7 of the act of 1891, permitting appeals from interlocutory orders granting or continuing an injunction, a brief review of successive changes is necessary. The original act, as stated, permitted appeals from interlocutory orders only when they *granted or continued* an injunction. Sec. 7, act of 1891. In 1895 (see 28 Stat. at L. 666, chap. 96; U. S. Comp. Stat. 1901, p. 551). Congress amended this section, and enlarged its scope by adding the words "or refusing or dissolving an injunction." *Re Tampa Suburban R. Co.* 168 U. S. 588, 42 L. ed. 590, 18 Sup. Ct. Rep. 177.

By the act of June 6, 1900, Congress amended the seventh section of the act without mentioning the act of 1895, and as amended the seventh section read substantially that when on hearing in equity by a judge in vacation, or in open court, an injunction shall be granted or continued, or a receiver is appointed by interlocutory order, the same may be appealed from. *Joseph Dry Goods Co. v. Hecht*, 57 C. C. A. 64, 120 Fed. 760.

This act of 1900 has been construed to mean a repeal of the act of 1895, and now interlocutory orders *granting or continuing* an injunction can only be appealed from, and the right of appeal does not extend to refusing or dissolving an injunction. *Columbia Wire Co. v. Boyce*, 44 C. C. A. 588, 104 Fed. 173; *March v. Romare*, 53 C. C. A. 574, 116 Fed. 354; *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* 44 C. C. A. 92, 104 Fed. 622; *Heinze v. Butte & B. Consol. Min. Co.* 46 C. C. A. 219, 107 Fed. 167; *Western Electric Co. v. Williams-Abbott Electric Co.* 48 C. C. A. 159, 108 Fed. 953; *Berliner Gramophone Co. v. Seaman*, 51 C. C. A. 440, 113 Fed. 750; *Shumaker v. Security Life & Annuity Co.* 86 C. C. A. 302, 159 Fed. 112; *Southern R. Co. v. Carolina Coal & Ice Co.* 81 C. C. A. 15, 151 Fed. 477; *Star Brass Works v. General Electric Co.* 63 C. C. A. 604, 129 Fed. 102; *Lewis v. Hitchman Coal & Coke Co.* 100 C. C. A. 137, 176 Fed. 549; *National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co.* 44 C. C. A. 664, 105 Fed. 670.

Section 7 of the acts of 1891 and 1900 was again amended in April, 1906, as follows: That where, upon a hearing in equity by a judge in a district or circuit court, or by a judge in vacation, an injunction shall be granted or continued or a receiver appointed by an interlocutory order, an appeal may be taken, provided it is taken in thirty days from the entry of the order, and it shall have precedence in the appellate court; but the proceedings are not stayed unless so specially ordered, and the court may require an additional bond. *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 A. & E. Ann. Cas. 997; *Root v. Mills*, 94 C. C. A. 174, 168 Fed. 688; *Lewis v. Hitchman Coal & Coke Co.* 100 C. C. A. 137, 176 Fed. 549; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 A. & E. Ann. Cas. 997; *Southern R. Co. v. Carolina Coal & Ice Co.* 81 C. C. A. 15, 151 Fed. 477. See Fed. Stat. Anno. Supp. 1907, p. 192. The cases under the Act of 1895 are no longer authority. *Columbia Wire Co. v. Boyce*, 44 C. C. A. 588, 104 Fed. 172; *Westinghouse Air-Brake Co. v. Christensen Engineering Co.* 44 C. C. A. 92, 104 Fed. 622; *Rowan v. Ide*, 46 C. C. A. 214, 107 Fed. 161.

See sec. 129, New Code, chap. 6, effective January 1st, 1912, allowing appeals from decrees or orders granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, or appointing a receiver.

### *Appeal, How Limited.*

The next point to be observed is that an appeal from the interlocutory order, as above stated, is dependent upon the fact that an appeal would lie to the *circuit court of appeals* from a final decree in the main case. *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 24 C. C. A. 195, 33 U. S. App. 734, 78 Fed. 517, 518; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 514, 8 A. & E. Ann. Cas. 997; *Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781; *Stafford v. King*, 32 C. C. A. 536, 61 U. S. App. 487, 90 Fed. 140. Where the Supreme Court alone would have appellate jurisdiction under section 5 of the act of 1891, there would be no appellate jurisdiction of an interlocutory decree rendered in such case, was held to be the rule in *Wright v. MacFarlane*, 58 C. C. A. 570, 122 Fed. 770, 771, and cases cited above;

but it is now held, under the act amending section 7 of March, 1906, above referred to, that an appeal to the circuit court of appeals can be had from an interlocutory order, etc., though a question of jurisdiction be the only issue. *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 514, 8 A. & E. Ann. Cas. 997. See *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 24 C. C. A. 195, 33 U. S. App. 734, 78 Fed. 518.

### *Time of Appeal.*

The next point to be observed in appeals of this character is that it must be taken in thirty days from the entry of the order, or you lose your right. Sec. 7, act of 1891, sec. 129, New Code; *Re Haberman Mfg. Co.* 147 U. S. 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527. This short time given is for the protection of the defendant. *Rowan v. Ide*, 46 C. C. A. 214, 107 Fed. 161. See *Fed. Stat. Anno. Supp.* 1907, p. 192; *Root v. Mills*, 94 C. C. A. 171, 168 Fed. 688; New Code, sec. 129.

### *Bond in Interlocutory Appeals.*

By original rule 13, section 2, of the rules governing the circuit court of appeals, it is provided that on all appeals from any interlocutory order or decree granting or continuing an injunction in the circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of the court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal. The amount rests in the discretion of the court. *Barcus v. Sherwood*, 69 C. C. A. 200, 136 Fed. 184; *Martin v. Hazard Powder Co.* 93 U. S. 302, 23 L. ed. 885; New Code, sec. 129.

### *Effect of Appeal on Injunction.*

In appeals from decrees granting, continuing, or dissolving injunctions, the giving of bond grants the appeal, but does not affect the order as to the injunction, whether the bond be in form a supersedeas or not. In this respect it differs from appeals in ordinary chancery suits, where giving a supersedeas bond operates as a supersedeas. *Lownsdale v. Gray's Harbor*

Boom Co. 117 Fed. 982. The rule, then, is that an appeal from granting or continuing or dissolving an interlocutory injunction has no effect whatever on the injunction. The judge may, on allowing the appeal, make such modifications of the injunction as he sees proper under the particular circumstances; that is, he may suspend or change it as he sees proper, or as to him may appear equitable, but the giving of bond and notice of appeal has no effect as a supersedeas. Equity rule 93; Proviso sec. 7, act of 1891; and amendments above referred to. See sec. 129, New Code, chap. 6, embodying old law. Green Bay & M. Canal Co. v. Norrie, 118 Fed. 923; Knox County v. Harshman, 132 U. S. 16, 33 L. ed. 250, 10 Sup. Ct. Rep. 8; Interstate Commerce Commission v. Louisville & N. R. Co. 101 Fed. 146; see Shelby Steel Tube Co. v. Delaware Seamless Tube Co. 161 Fed. 798; Timolat v. Philadelphia Pneumatic Tool Co. 130 Fed. 903; Re Haberman Mfg. Co. 147 U. S. 530, 37 L. ed. 266, 13 Sup. Ct. Rep. 527; Crown Cork & Seal Co. v. Standard Stopper Co. 69 C. C. A. 200, 136 Fed. 184; Andrews v. National Foundry & Pipe Works, 10 C. C. A. 60, 18 U. S. App. 458, 24 U. S. App. 81, 61 Fed. 790; American Strawboard Co. v. Indianapolis Water Co. 26 C. C. A. 470, 46 U. S. App. 526, 81 Fed. 423; Hovey v. McDonald, 109 U. S. 150, 27 L. ed. 888, 3 Sup. Ct. Rep. 136; see National Heeling Mach. Co. v. Abbott, 77 Fed. 464, 465, where supersedeas allowed to avoid closing a business.

So an order which keeps *in statu quo* the property in litigation will not be disturbed on appeal unless there has been a gross abuse of discretion. Shea v. Nelima, 66 C. C. A. 263, 133 Fed. 216, and cases cited. Again, the appeal does not affect the power of the trial court to proceed with the cause in respect to any matter not involved in the appeal. *Ex parte* National Enameling & Stamping Co. 201 U. S. 156, 50 L. ed. 707, 26 Sup. Ct. Rep. 404; Cuyler v. Atlantic & N. C. R. Co. 132 Fed. 568.

#### *Rule Governing the Court of Appeals in Considering Interlocutory Appeals.*

The court of appeals will not reverse, unless improvidently granted and hurtful (*Workingmen's Amalgamated Council v.*

United States, 6 C. C. A. 258, 13 U. S. App. 426, 57 Fed. 85; Rahley v. Columbia Phonograph Co. 58 C. C. A. 639, 122 Fed. 625; Southern P. Co. v. Earl, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690; Thompson v. Nelson, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339; Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co. 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 250; see Northern Securities Co. v. Hariman, 67 C. C. A. 245, 134 Fed. 331, for exception), which should be made clearly to appear. Nor will it on motion remand the cause for further proceeding without reversing after examination on merits. Greene v. United Shoe Machinery Co. 60 C. C. A. 93, 124 Fed. 961. It will on proper application dismiss an appeal without prejudice to appellant, if appellee is not unduly prejudiced (Ibid.); and it seems upon request of trial judge, it will dismiss an appeal for defendant to file a bill of review on newly discovered evidence. Mossberg v. Nutter, 60 C. C. A. 98, 124 Fed. 966; see Marden v. Campbell Printing-Press & Mfg. Co. 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 810.

### *Entering Decree on Merits.*

The question has often arisen as to the right of the appellate court to enter a decree on the merits of the whole case, when the case has been appealed under section 7 of the act of 1891; and while there has been some conflict of authority, yet the rule seems to be established, that where the nature of the case permits, the appellate court will end the litigation, and enter a decree on the merits. Knoxville v. Africa, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; Berliner Gramophone Co. v. Seaman, 49 C. C. A. 99, 110 Fed. 33; Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407; Texas Consol. Compress & Mfg. Asso. v. Storrow, 34 C. C. A. 182, 92 Fed. 10; Re Tampa Suburban R. Co. 168 U. S. 588, 42 L. ed. 590, 18 Sup. Ct. Rep. 177; Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co. 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545; Tornanses v. Melsing, 47 C. C. A. 596, 109 Fed. 710; Marden v. Campbell Printing-Press & Mfg. Co. 15 C. C. A. 26, 33 U. S. App. 123, 67 Fed. 810; Co-operating Merchants' Co. v. Hallock, 64 C. C. A. 104, 128

Fed. 596-598; *Harriman v. Northern Securities Co.* 197 U. S. 287, 49 L. ed. 760, 25 Sup. Ct. Rep. 493, and cases cited; *Chapman v. Yellow Poplar Lumber Co.* 74 C. C. A. 331, 143 Fed. 204, 205; *Carson v. Combe*, 29 C. C. A. 660, 52 U. S. App. 622, 86 Fed. 210; *Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789. But not when the rights of parties can only be made apparent upon full proof. *Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 502; *Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789.

Thus, where the question is one of law, which determines the ultimate rights of the parties (*Knoxville v. Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501); or where in granting the interlocutory injunction the whole merits of the case are involved, or when it should appear that the bill had no equity to support it (*Smith v. Vulcan Iron Works*, 165 U. S. 525, 41 L. ed. 812, 17 Sup. Ct. Rep. 407); or under similar conditions shown in the cases above cited, the court will dispose of the case on its merits, though coming up under section 7 of the act. Where, however, the record is insufficient or incomplete (*Clark v. McGhee*, 31 C. C. A. 321, 59 U. S. App. 69, 87 Fed. 789), as where there is no full proof of the facts and the rights of the parties are not made to fully appear, then the court will only consider whether the interlocutory order was providently granted (*Ibid.*; *Knoxville v. Africa*, *supra*; *Thompson v. Nelson*, 18 C. C. A. 137, 37 U. S. App. 478, 71 Fed. 339). As to forms of petition for appeal and notice and of such other procedure as is necessary to perfect the appeal, formulas will be hereafter given, as each step of the procedure is discussed.

### *Appeal from Interlocutory Decree Appointing Receivers.*

An appeal lies from an interlocutory order appointing a receiver, though the order was made on an *ex parte* hearing. *Joseph Dry Goods Co. v. Hecht*, 57 C. C. A. 64, 120 Fed. 760; *Pacific Northwest Packing Co. v. Allen*, 48 C. C. A. 521, 109 Fed. 515; see *Heinze v. Butte & B. Consol. Min. Co.* 46 C. C. A. 219, 107 Fed. 166; see *Root v. Mills*, 94 C. C. A. 174, 168 Fed. 688, construing the amendment to section 1906 as to the words "a hearing in equity." New Code, sec. 129.



## CHAPTER CIV.

### FINAL DECREES AS A BASIS FOR APPEALS.

With the exception created by the seventh section of the act of 1891, the general rule, without question, is that to authorize an appeal, the decree must be *final* as to all matters within the pleadings. *Obert v. Marquet*, 99 C. C. A. 60, 175 Fed. 50 and cases cited; *Wilson v. Smith*, 61 C. C. A. 446, 126 Fed. 919; *Mordecai v. Lindsay*, 19 How. 201, 15 L. ed. 624; *Robinson v. Wilmington*, 9 C. C. A. 84, 8 U. S. App. 541, 60 Fed. 471; *Craighead v. Wilson*, 18 How. 201, 15 L. ed. 333; *Green v. Fisk*, 103 U. S. 519, 26 L. ed. 486; *McLish v. Roff*, 141 U. S. 661, 25 L. ed. 893, 12 Sup. Ct. Rep. 118. (See "Final Decrees.") By section 6 of the act of 1891 it is provided that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal *final* decisions in the circuit and district courts, in all cases other than those provided in section 5, or otherwise provided by law, as in remanding a case to a State court, etc. *Robinson v. Belt*, 5 C. C. A. 521, 12 U. S. App. 431, 56 Fed. 328; *Hooven, O. & R. Co. v. Featherstone's Sons*, 49 C. C. A. 229, 111 Fed. 81; *McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118; *Bowker v. United States*, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802.

In section 5 of the act of 1891, providing for appeals to the Supreme Court direct, the word "final" is not used, but in *McLish v. Roff*, supra, it is held that appeals under this section can be taken only after final judgment entered, when the party must elect whether he will take his writ of error or appeal to the Supreme Court, or to the court of appeals upon the whole case. *McLish v. Roff*, 141 U. S. 666, 35 L. ed. 894, 12 Sup. Ct. Rep. 118; *Bowker v. United States*, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802; *United States v. John*, 155 U. S. 114, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *Gates v.*

Bucki, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 961; Barling v. Bank of British N. A. 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 263; Davis & R. Bldg. & Mfg. Co. v. Barber, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465, 466. So a writ of error to review the judgments of the circuit court of appeals by the Supreme Court,—the decree must be *final*. MacLeod v. Graven, 24 C. C. A. 449, 47 U. S. App. 573, 79 Fed. 84, 85; Morris v. Dunbar, 79 C. C. A. 226, 149 Fed. 406; Beamer v. Werner, 86 C. C. A. 289, 159 Fed. 99.

### *What is a Final Decree?*

I have already defined a final decree under "Decrees," reference to which, and authorities there cited, is here made. We saw that whether it is final depends on its essence, and not on its form, or what it is called (Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860), and the Supreme Court has been liberal, and not technical, in construing the words "final decree." Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 557. We saw, again, that to be final the *controversy* must be settled (Hohorst v. Hamburg-American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; French v. Shoemaker, 12 Wall. 98, 20 L. ed. 271); and the case must be left in such condition that if there be an affirmance by the appellate court, the court below will have nothing to do but execute the judgment (West v. East Coast Cedar Co. 51 C. C. A. 416, 113 Fed. 743; Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424, 58 Fed. 4, 5; Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41; Stevens v. Nave-McCord Mercantile Co. 80 C. C. A. 25, 150 Fed. 71; National Bank v. Smith, 156 U. S. 333, 39 L. ed. 442, 15 Sup. Ct. Rep. 358; Meagher v. Minnesota Thresher Mfg. Co. 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; Winthrop Iron Co v. Meeker, 109 U. S. 183, 27 L. ed. 899, 3 Sup. Ct. Rep. 111; McGourkey v. Toledo & O. C. R. Co. 146 U. S. 546, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32; Kemp v. National Bank, 48 C. C. A. 213, 109 Fed. 50; Grant v. Phoenix Mut. L. Ins. Co. 106 U. S. 431, 27 L. ed. 238, 1 Sup. Ct. Rep. 414; Defer v. DeMay, 168 U. S. 704, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941); and finally must

be determined by Federal, and not State law (*Menge v. Warri-ner*, 57 C. C. A. 432, 120 Fed. 816, 817 and cases cited).

At common law it is not difficult to determine when a judgment is final, but difficulties arise in determining when a decree in equity is final when tested by the rules above given. The various forms it assumes, because of its flexibility, has given rise to much conflict of authority in determining a decree to be final and appealable. *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 788, and cases cited.

Of course, when the decree determines the litigation, and leaves nothing to be done but to enforce it by execution or order, we can have no difficulty in determining its character (*West v. East Coast Cedar Co.* 51 C. C. A. 416, 113 Fed. 743); but where something is to be done before the decree can be carried into execution, then arises the question whether it can be the basis of an appeal. It would not be profitable to follow the labyrinth of cases, and I can do no more than state some of the conditions under which a decree has been held final, though other proceedings were necessary to make it effective.

First. It seems a decree may be final, though the court gives parties a right to apply for modifications and directions (*Stovall v. Banks*, 10 Wall. 586, 19 L. ed. 1037; *Eau Claire v. Payson*, 46 C. C. A. 466, 107 Fed. 552, 557; *Re Farmers' Loan & T. Co.* 129 U. S. 213, 32 L. ed. 657, 9 Sup. Ct. Rep. 265); or though the bill be retained after the decree to adjust by further decree the accounts between the parties pursuant to the decree passed (*Thompson v. Dean* [*Dean v. Nelson*] 7 Wall. 346, 19 L. ed. 95; *Forgay v. Conrad*, 6 How. 204, 12 L. ed. 405).

Second. A decree may be final which determines the issues, but holds the fund for distribution. *Bank of Lewisburg v. Sheffey*, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755; *Ex parte Norton*, 108 U. S. 242, 27 L. ed. 711, 2 Sup. Ct. Rep. 490; *Andrews v. National Foundry & Pipe Works*, 19 C. C. A. 548, 34 U. S. App. 632, 73 Fed. 518; *Washington & A. R. Co. v. Bradley* (*Washington & A. R. Co. v. Washington*), 7 Wall. 577, 19 L. ed. 274. But in *Bank of Lewisburg v. Sheffey*, 140 U. S. 452, 35 L. ed. 496, 11 Sup. Ct. Rep. 755, it is said that it must be the distribution as decreed, and not held, pending consideration how to be distributed.

Third. A decree may be final though referred to a master (Chase v. Driver, 34 C. C. A. 668, 92 Fed. 785, and cases cited; Hill v. Chicago & E. R. Co. 140 U. S. 54, 35 L. ed. 332, 11 Sup. Ct. Rep. 690), but the reference must be as to some matter in aid of the execution, and not affecting the substance of the decree itself. *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32, and authorities cited; *Grant v. East & West R. Co.* 1 C. C. A. 681, 2 U. S. App. 182, 50 Fed. 797. Thus if the decree be made fixing the rights and liabilities of the parties, and the reference to the master is only for a ministerial purpose, and not for further proceedings contemplated by the court, then the decree is appealable, though referred to a master. *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; *West v. East Coast Cedar Co.* 51 C. C. A. 416; *Latta v. Kilbourn*, 150 U. S. 540, 37 L. ed. 1175, 14 Sup. Ct. Rep. 201, 113 Fed. 743.

To illustrate: If the reference to a master is to state an account upon which a decree is to be entered, then it is not final. *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 784; *Perkins v. Fourniquet*, 6 How. 208, 12 L. ed. 407; *Pulliam v. Christian*, 6 How. 211, 212, 12 L. ed. 408, 409; *Craighead v. Wilson*, 18 How. 201, 15 L. ed. 333; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; *Lodge v. Twell*, 135 U. S. 235, 34 L. ed. 154, 10 Sup. Ct. Rep. 745; *Moran v. Hagerman*, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 503; *California Nat. Bank v. Stateler*, 171 U. S. 449, 43 L. ed. 234, 19 Sup. Ct. Rep. 6; *Parsons v. Robinson*, 122 U. S. 114, 30 L. ed. 1122, 7 Sup. Ct. Rep. 1153; *Burlington, C. R. & N. R. Co. v. Simmons*, 123 U. S. 56, 31 L. ed. 74, 8 Sup. Ct. Rep. 58; *Southern R. Co. v. Postal Tele. Cable Co.* 179 U. S. 643, 45 L. ed. 356, 21 Sup. Ct. Rep. 249; *Ogden City v. Weaver*, 47 C. C. A. 485, 108 Fed. 567; *Mercantile Trust Co. v. Chicago, P. & St. L. R. Co.* 60 C. C. A. 651, 123 Fed. 391. But if an accounting is not asked in the bill, and the court should order an accounting simply in execution of the decree, then it is final. *Ibid.*; *McGourkey v. Toledo & O. C. R. Co.* 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; *West v. East Coast Cedar Co.* 51 C. C. A. 416, 113 Fed. 743; *Grant v. East & W. R. Co.* 1 C. C. A. 681, 2 U.

S. App. 182, 50 Fed. 797; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 784, 785. It appears, then, in all of these cases, that if the rights and liabilities of the parties are fixed by the decree, and the further act to be done, or ordered to be done, is only in aid of the execution of the decree, then the decree is final; but if the act to be done or contemplated is intended to be used in any way to determine judicially the rights or liabilities of parties, then the decree is not final. McGourkey v. Toledo & O. C. R. Co. 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170.

Fourth. A decree may be final that completely determines the right of some of the parties to a suit, who are not jointly liable with those against whom the suit is retained, and which completely determines a collateral matter distinct from the general subject of litigation. Illustrative cases: Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Rust v. United Waterworks Co. 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 132; Hooven, O. & R. Co. v. John Featherstone's Sons, 49 C. C. A. 229, 111 Fed. 81; Kemp v. National Bank, 48 C. C. A. 213, 109 Fed. 48; Standley v. Roberts, 8 C. C. A. 305, 19 U. S. App. 407, 59 Fed. 839, 840, and cases cited. Hill v. Chicago & E. R. Co. 140 U. S. 54, 35 L. ed. 332, 11 Sup. Ct. Rep. 690; Sanders v. Bluefield Waterworks & Improv. Co. 45 C. C. A. 475, 106 Fed. 587; Eau Claire v. Payson, 46 C. C. A. 466, 107 Fed. 552; Edgell v. Felder, 39 C. C. A. 540, 99 Fed. 324; Tuttle v. Claffin, 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122; Stewart v. Masterson, 131 U. S. 159, 33 L. ed. 117, 9 Sup. Ct. Rep. 682. But see Frow v. De La Vega, 15 Wall. 554, 21 L. ed. 61; Hohorst v. Hamburg-American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; Baker v. Old Nat. Bank, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed. 450; Blossom v. Milwaukee & C. R. Co. 1 Wall. 656, 17 L. ed. 673; Internal Improv. Fund v. Greenough, 105 U. S. 531, 26 L. ed. 1159.

### *Judgments Not Final and Appealable.*

A decree on condition is not a final decree (Stratton v. Dewey, 24 C. C. A. 435, 41 U. S. App. 741, 79 Fed. 32); nor an order dismissing a defendant in a joint obligation (Beck &

P. Lithographing Co. v. Wacker & B. Brewing & Malting Co. 26 C. C. A. 11, 46 U. S. App. 486, 76 Fed. 10; Frow v. De La Vega, 15 Wall. 554, 21 L. ed. 61; Hohorst v. Hamburg-American Packet Co. 148 U. S. 265, 37 L. ed. 445, 13 Sup. Ct. Rep. 590; Cay v. Vereen, 75 C. C. A. 667, 144 Fed. 839; Baker v. Old Nat. Bank, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed. 450; Memphis Keeley Institute v. Leslie E. Keeley Co. 144 Fed. 628); nor when default entered against one defendant jointly obligated, while cause pending as to others (Frow v. De La Vega, 15 Wall. 554, 21 L. ed. 61); nor an order denying an intervention (Lewis v. Baltimore & L. R. Co. 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; Buel v. Farmers' Loan & T. Co. 44 C. C. A. 213, 104 Fed. 839; see Hamlin v. Toledo, St. L. & K. C. R. Co. 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 664; Iron R. Co. v. Toledo, D. & B. R. Co. 10 C. C. A. 319, 18 U. S. App. 479, 62 Fed. 166); nor while petition for rehearing is pending (Aspen Min. & Smelting Co. v. Billings, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4, and authorities); or motion for new trial (Kingman & Co. v. Western Mfg. Co. 170 U. S. 680, 42 L. ed. 1194, 18 Sup. Ct. Rep. 786; in Re Worcester County, 42 C. C. A. 637, 102 Fed. 810); nor judgments remanding causes to State courts (Joy v. Adelbert College, 146 U. S. 355, 36 L. ed. 1003, 13 Sup. Ct. Rep. 186; Bender v. Pennsylvania Co. 148 U. S. 502, 37 L. ed. 537, 13 Sup. Ct. Rep. 640; Illinois C. R. Co. v. Brown, 156 U. S. 386, 39 L. ed. 461, 15 Sup. Ct. Rep. 656; Chicago, St P. M. & O. R. Co. v. Roberts, 141 U. S. 694, 35 L. ed. 905, 12 Sup. Ct. Rep. 123); nor when referred to a master whose functions as to the matter of reference are judicial, and not ministerial. Moran v. Hagerman, 12 C. C. A. 239, 29 U. S. App. 71, 64 Fed. 503, and authorities.

Illustrative cases declaring judgments not final: National Bank v. Smith, 156 U. S. 330, 39 L. ed. 441, 15 Sup. Ct. Rep. 358; Latta v. Kilbourn, 150 U. S. 524, 37 L. ed. 1169, 14 Sup. Ct. Rep. 201; Louisiana Nat. Bank v. Whitney, 121 U. S. 285, 30 L. ed. 962, 7 Sup. Ct. Rep. 897; Luxton v. North River Bridge Co. 147 U. S. 341, 37 L. ed. 195, 13 Sup. Ct. Rep. 356; McGourkey v. Toledo & O. R. Co. 146 U. S. 545, 36 L. ed. 1083, 13 Sup. Ct. Rep. 170; Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 378, 40 L. ed. 463, 16 Sup. Ct. Rep.

318; *Lodge v. Twell*, 135 U. S. 235, 34 L. ed. 154, 10 Sup. Ct. Rep. 745; *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 264, 37 L. ed. 444, 13 Sup. Ct. Rep. 590; *Meagher v. Minnesota Thresher Mfg. Co.* 145 U. S. 610, 36 L. ed. 835, 12 Sup. Ct. Rep. 876; *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 93, 33 L. ed. 276, 10 Sup. Ct. Rep. 32; *Winters v. Ethell*, 132 U. S. 209, 33 L. ed. 339, 10 Sup. Ct. Rep. 56; *Parsons v. Robinson*, 122 U. S. 115, 30 L. ed. 1123, 7 Sup. Ct. Rep. 1153; *New York Security & T. Co. v. Illinois Transfer R. Co.* 44 C. C. A. 161, 104 Fed. 710; *Baker v. Old Nat. Bank*, 33 C. C. A. 570, 63 U. S. App. 34, 91 Fed. 449; *Florida Constr. Co. v. Young*, 8 C. C. A. 231, 11 U. S. App. 683, 59 Fed. 722; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 916.

### *Judgments for Costs.*

As a general rule, judgments for costs alone cannot be appealed from. *Glendale Elastic Fabrics Co. v. Smith*, 100 U. S. 112, 25 L. ed. 547; *Russell v. Farley*, 105 U. S. 437, 26 L. ed. 1061; *Burns v. Rosenstein*, 135 U. S. 456, 34 L. ed. 195, 10 Sup. Ct. Rep. 817; see *The City of Augusta*, 25 C. C. A. 430, 50 U. S. App. 39, 80 Fed. 304; *Scatcherd v. Love*, 91 C. C. A. 639, 166 Fed. 54; *Blassengame v. Boyd*, 101 C. C. A. 129, 178 Fed. 5, and cases cited. *Ibid.* But the courts recognize exceptions to the rule (*Internal Improv. Fund v. Greenough*, 105 U. S. 527, 26 L. ed. 1157); as where the judgment is on the merits and the question of costs arise. See also *Re Michigan C. R. Co.* 59 C. C. A. 643, 124 Fed. 727; *Kell v. Trenchard*, 76 C. C. A. 611, 146 Fed. 245.

### *Judgments by Consent.*

The old rule that decrees by consent cannot be appealed from does not always prevail in the United States courts; yet the court will not consider in such cases any error which in law is waived by the consent. *Eustis v. Henrietta*, 20 C. C. A. 537, 41 U. S. App. 182, 74 Fed. 578; *Pacific R. Co. v. Ketchum*, 101 U. S. 289-296, 25 L. ed. 932-935. See *Kaw Valley Drainage Dist. v. Union P. R. Co.* 90 C. C. A. 320,

163 Fed. 836, and cases cited; *United States v. Babbitt*, 104 U. S. 768, 26 L. ed. 922.

It has been held that parties accepting benefits under a decree cannot attack it (*Albright v. Oyster*, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644), and in *McCafferty v. Celluloid Co.* 43 C. C. A. 540, 61 U. S. App. 394, 104 Fed. 305, it was held that a party stipulating that a decree in a pending suit shall be entered upon conditions to be fulfilled, and the decree being entered in pursuance thereof, errors cannot be assigned. *Nashville C. & St. L. R. Co. v. United States*, 113 U. S. 261, 28 L. ed. 971, 5 Sup. Ct. Rep. 460.



## CHAPTER CV.

### APPEALS, WHERE TAKEN.

#### *From the Circuit Court to Supreme Court Direct.*

We have seen that the act of 1891 distributes the appellate jurisdiction of the national judicial system between the Supreme Court and the circuit court of appeals, and has established by designated classes the cases in which each of the two courts shall respectively have jurisdiction. I will now discuss appeals from the circuit courts to the Supreme Court direct. This jurisdiction is based on three classes of cases.

First. Cases in which the jurisdiction of the circuit court is challenged directly in the suit in which a final judgment has been entered, in which case the judge must certify only the question of jurisdiction for decision. *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; *Bowker v. United States*, 186 U. S. 135, 46 L. ed. 1090, 22 Sup. Ct. Rep. 802; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 96, 42 L. ed. 674, 18 Sup. Ct. Rep. 264; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Hennessy v. Richardson Drug Co.* 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 198; *Crawford v. McCarthy*, 78 C. C. A. 356, 148 Fed. 198; *Davis v. Cleveland, C. C. & St. L. R. Co.* 84 C. C. A. 453, 156 Fed. 776, 777; *United States ex rel. Mudsill Min. Co. v. Swan*, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647; *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 533; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; *Smith v. McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Chappell v. United States*, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397; *Kentucky State Bd. of Control v. Lewis*,

100 C. C. A. 208, 176 Fed. 556. See *Bien v. Robinson*, 208 U. S. 423, 52 L. ed. 556, 28 Sup. Ct. Rep. 379; *Empire State-Idaho Min. & Developing Co. v. Henley*, 205 U. S. 225, 51 L. ed. 779, 27 Sup. Ct. Rep. 476; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 451 (where other questions involved prevented a direct appeal or permitted an appeal to either the circuit or Supreme Court).

Second. Cases involving the construction or application of the Constitution of the United States. *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Cosmopolitan Min. Co. v. Walsh*, 193 U. S. 468, 48 L. ed. 752, 24 Sup. Ct. Rep. 489; *Sloan v. United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570; *Cummings v. Chicago*, 188 U. S. 411, 47 L. ed. 527, 23 Sup. Ct. Rep. 472; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449. A mere construction of an act of Congress is not embraced in statute. *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

Third. Cases in which the constitutionality of a law of the United States, or the validity of a treaty, is in issue, or when the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States (*Re Marmo*, 138 Fed. 201; *Mitchell v. Furman*, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430; *Arkansas v. Schlierholz*, 179 U. S. 598, 45 L. ed. 335, 21 Sup. Ct. Rep. 229; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318; see *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 451, 452; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Pike's Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 216, 47 L. ed.

779, 23 Sup. Ct. Rep. 498; *Owensboro v. Owensboro Water Works Co.* 53 C. C. A. 146, 115 Fed. 318); or power of Congress over navigable waters (*Cummings v. Chicago*, 188 U. S. 410-431, 47 L. ed. 525-531, 23 Sup. Ct. Rep. 472); or arising under a treaty (*Mitchell v. Furman*, 180 U. S. 402, 45 L. ed. 596, 21 Sup. Ct. Rep. 430); or a right to vote for a member of Congress (*Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17). New Code, sec. 238.

The direct appeal to the Supreme Court, provided by U. S. Rev. Stat. secs. 652, 693, U. S. Comp. Stat. 1901, pp. 527, 566, upon a certificate of dissent, has not been referred to in the act of 1891, and was declared repealed in *The Habana*, 175 U. S. 684, 44 L. ed. 322, 20 Sup. Ct. Rep. 290, and *Fisk v. Henarie*, 142 U. S. 459, 35 L. ed. 1079, 12 Sup. Ct. Rep. 207. Again, by section 16 of the interstate commerce act of 1887, 24 Stat. at L. 379, chap. 104, amended in 25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3165, either party may appeal direct to the Supreme Court if the matter in dispute exceeds two thousand dollars, and the appeal is taken in twenty days, but in view of the decision in *The Habana*, 175 U. S. 684, 685, 44 L. ed. 322, 323, 20 Sup. Ct. Rep. 290, this provision has been repealed, and there is now no direct appeal from the circuit to the Supreme Court except as stated in the act of 1891. *National Exch. Bank v. Peters*, 144 U. S. 570, 36 L. ed. 545, 12 Sup. Ct. Rep. 767. See *Interstate Commerce Commission v. Baird*, 194 U. S. 26, 48 L. ed. 862, 24 Sup. Ct. Rep. 563, construing act 1903, sec. 3, providing for direct appeal to the Supreme Court in proceedings brought by the Interstate Commerce Commission.

I will now take up the cases in which a direct appeal can be taken to the Supreme Court, in their order.

First. In any case in which the jurisdiction of the circuit court is in issue, in which case the question of jurisdiction alone must be certified to the Supreme Court by the judge below, and the Supreme Court has exclusive jurisdiction. *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Crawford v. McCarthy*, 78 C. C. A. 356, 148 Fed. 200 and cases cited. *Halpin v. Amerman*, 70 C. C. A. 462, 138 Fed. 548; *Alton Water Co. v.*

*Brown*, 92 C. C. A. 598, 166 Fed. 840-842. These cases limit the jurisdiction to the jurisdiction as a Federal court, excluding questions of jurisdiction applicable to State and Federal courts. *Bowker v. United States*, 186 U. S. 135, 46 L. ed. 1090, 22 Sup. Ct. Rep. 802; *Scully v. Bird*, 209 U. S. 485, 52 L. ed. 901, 28 Sup. Ct. Rep. 597; *Bache v. Hunt*, 193 U. S. 523, 48 L. ed. 774, 24 Sup. Ct. Rep. 547; *Evans-Snider-Euel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 658; *Courtney v. Pradt*, 196 U. S. 89, 49 L. ed. 398, 25 Sup. Ct. Rep. 208. See *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; *Boston & M. R. Co. v. Gokey*, 79 C. C. A. 64, 149 Fed. 42, 9 A. & E. Ann. Cas. 384.

In *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526, the court says that in order to maintain jurisdiction in the Supreme Court in this class of cases, the record must distinctly show, without equivocation, that the court below sends up for consideration the single and definite question of jurisdiction. *Waterford v. Elson*, 78 C. C. A. 675, 149 Fed. 93; *Arkansas v. Schillerholz*, 179 U. S. 600, 45 L. ed. 336, 21 Sup. Ct. Rep. 229; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Chappell v. United States*, 160 U. S. 499-507, 40 L. ed. 510-512, 16 Sup. Ct. Rep. 397; *Mexican C. R. Co. v. Eckman*, 187 U. S. 429, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Cosmopolitan Min. Co. v. Walsh*, 183 U. S. 460, 48 L. ed. 749, 24 Sup. Ct. Rep. 489; *Anglo-American Provision Co. v. Davis Provision Co.* 191 U. S. 376, 48 L. ed. 228, 24 Sup. Ct. Rep. 93. See *Giles v. Harris*, 189 U. S. 490, 47 L. ed. 913, 23 Sup. Ct. Rep. 639. There must be no mere suggestion that the jurisdiction was in issue, and no other question can be certified with it. *Davis v. Geissler*, 162 U. S. 291, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; *Van Wagenen v. Sewall*, 160 U. S. 373, 40 L. ed. 461, 16 Sup. Ct. Rep. 370; *Hennessy v. Richardson Drug Co.* 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532. But it seems, where a case is taken direct on ground of jurisdiction alone, and thus certified, the Supreme Court may pass upon a question of fact where the decision below is wrong, and upon this set aside

the judgment of the court below. *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 256, 53 L. ed. 787, 29 Sup. Ct. Rep. 445. Questions for direct appeal must be real and substantial. *Lampasas v. Bell*, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368.

### *Grounds of Certification.*

The absence of jurisdiction may be certified on the want of service of process. *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740; *Remington v. Central P. R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; *Kendall v. American Automatic Loom Co.* 198 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct. Rep. 768; *Shepard v. Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157, 54 L. ed. 708, 27 L.R.A.(N.S.) 823, 30 Sup. Ct. Rep. 463, S. C. 84 C. C. A. 453, 156 Fed. 775; see *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196-201, and cases cited; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 246, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; *Boston & M. R. Co. v. Gokey*, 79 C. C. A. 64, 149 Fed. 44. The cases which limit the jurisdiction of the Federal court as a Federal court apply to questions arising after a valid service is made, and not to the question as to whether service has been made and jurisdiction acquired. *Board of Trade v. Hammond Elevator Co.* 198 U. S. 424, 49 L. ed. 1111, 25 Sup. Ct. Rep. 740. Such certificate may also issue when the cause is not properly removed from the State court (*Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; see *Kansas City North Western R. Co. v. Zimmerman*, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730); or when party sues as assignee and the assignor could not have sued (*Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 261); or any other ground upon which the jurisdiction of the court below has been decisively attacked by plea or demurrer, and the same has been overruled, or when case dismissed on de-

murrer for want of jurisdiction (Davis & R. Bldg. & Mfg. Co. v. Barber, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465, 466. The Alliance, 17 C. C. A. 124, 44 U. S. App. 52, 70 Fed. 274; Hennessy v. Richardson Drug Co. 189 U. S. 25, 47 L. ed. 697, 23 Sup. Ct. Rep. 532); but not when the question has been made that there is no jurisdiction in equity because of an adequate remedy at law (United States ex rel. Mudsill Min. Co. v. Swan, 13 C. C. A. 77, 31 U. S. App. 112, 65 Fed. 647; Smith v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 L. ed. 159, 24 Sup. Ct. Rep. 119; Kansas City North Western R. Co. v. Zimmerman, 210 U. S. 338, 52 L. ed. 1086, 28 Sup. Ct. Rep. 730).

*Conditions Under Which the Issue is Presented and Decided.*

First. To present the issue, the record must show the jurisdiction in issue, and that a final judgment was entered in the case in the circuit court (Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118), in favor of the defendant, thus disposing of the case. In such case the plaintiff should have the case certified to the Supreme Court, direct. United States v. Jahn, 155 U. S. 114, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; Bowker v. United States, 186 U. S. 138, 46 L. ed. 1091, 22 Sup. Ct. Rep. 802; Mexican C. R. Co. v. Eckman, 187 U. S. 432, 47 L. ed. 246, 23 Sup. Ct. Rep. 211; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658-660; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610.

Second. If jurisdiction is in issue, and the jurisdiction sustained, and judgment on merits is in favor of the defendant, the plaintiff should appeal the case to the circuit court of appeals, and if jurisdiction arises, it may be certified to the Supreme Court. New Orleans v. Benjamin, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; Evans-Snider-Buel Co. v. McCaskill, 41 C. C. A. 577, 101 Fed. 658-660.

Third. When the question of jurisdiction was directly involved, but the judgment of the whole case was in favor of the

plaintiff, the defendant may go direct to the Supreme Court on the question of jurisdiction, or go to the court of appeals on the merits, and have that court to certify the question of jurisdiction. *McLish v. Roff*, 141 U. S. 668, 35 L. ed. 895, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 114, 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *Harris v. Rosenberger*, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449; *Gates v. Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 965; *Carter v. Roberts*, 177 U. S. 500, 44 L. ed. 863, 20 Sup. Ct. Rep. 713; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 667.

Fourth. If plaintiff recovers in part, but is dissatisfied, and the jurisdiction has been put in issue and sustained, the defendant can go direct to the Supreme Court on the jurisdictional question, while the plaintiff may appeal to the circuit court of appeals on the merits. *United States v. Jahn*, 155 U. S. 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *North-eastern P. R. Co. v. Glaspell*, 1 C. C. A. 327, 4 U. S. App. 238, 49 Fed. 482. "The same observations are applicable where the the plaintiff objects to the jurisdiction and is, or both parties are dissatisfied with the judgment on its merits." *Evans-Snyder-Buel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 660. But where there are separate appeals of this character, the circuit court of appeals will continue the case until the Supreme Court acts on the question of jurisdiction. *Pullman's Palace Car Co. v. Central Transp. Co.* 22 C. C. A. 246, 39 U. S. App. 307, 76 Fed. 401, S. C. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

I repeat, then, that when the jurisdiction of the circuit court is put in issue with other issues on the merits, there is given to the losing party an election between the Supreme Court and the circuit court of appeals; that is, he may go direct to the Supreme Court on the question of jurisdiction, or he may take the whole case on its merits to the circuit court of appeals (*Ibid.*; *Robinson v. Caldwell*, 165 U. S. 361, 41 L. ed. 746, 17 Sup. Ct. Rep. 343; *Rust v. United Waterworks Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 129-132); and the circuit court of appeals may determine the question of jurisdiction in passing upon the whole case (*Ibid.*; see chapter 106,

“May Circuit Court of Appeals Determine Jurisdictional Questions”); or the court of appeals may certify the question of jurisdiction (*Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 898).

Again, if the jurisdiction is sustained, but the judgment is rendered in favor of the defendant on the merits, the plaintiff who has sustained the jurisdiction must appeal on the merits to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it for instruction or decide it. *Ibid.*; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 769.

Again, when the jurisdiction is sustained, but the plaintiff has a grievance as to the extent of his recovery, upon which account he desires to appeal, the plaintiff may appeal to the circuit court of appeals on the merits; or if the defendant has appealed, he may by cross appeal have the case reviewed as to his cause of complaint; or if the defendant has taken the case direct to the Supreme Court, on the question of jurisdiction, the plaintiff may appeal to the circuit court of appeals on the merits, but in this case the circuit court of appeals will suspend the hearing until the Supreme Court has determined the question of jurisdiction. *United States v. Jahn*, 155 U. S. 114, 115, 39 L. ed. 90, 15 Sup. Ct. Rep. 39, and authorities above cited.

### *Can Same Party Sue Out Two Appeals.*

The question has arisen whether the *same* party can sue out two appeals, one to the Supreme Court on jurisdiction, and the other to the circuit court of appeals on the merits. It was clearly decided in *Pullman's Palace Car Co. v. Central Transp. Co.* 22 C. C. A. 246, 39 U. S. App. 307, 76 Fed. 402, that he could, but that he cannot is clearly inferred from the language of the court in *McLish v. Roff*, 141 U. S. 665, 666, 35 L. ed. 894, 895, 12 Sup. Ct. Rep. 118; *United States v. Jahn*, 155 U. S. 113, 39 L. ed. 89, 15 Sup. Ct. Rep. 39; *Carter v. Roberts*, 177 U. S. 499, 44 L. ed. 862, 20 Sup. Ct. Rep. 713; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup.



Ct. Rep. 343; Columbus Constr. Co. v. Crane Co. 174 U. S. 601, 43 L. ed. 1103, 19 Sup. Ct. Rep. 721; Union & Planters' Bank v. Memphis, 189 U. S. 74, 47 L. ed. 714, 23 Sup. Ct. Rep. 604. However, it is said in Lockman v. Lang, 132 Fed. 1, that the practice of taking an appeal and writ of error to review the same adjudication is not only permissible, but commendable when counsel have just reason to doubt which is the proper proceeding.

*Certificate a Prerequisite.*

The first clause of section 5, act of 1891, requires, in any case in which the jurisdiction of the court is involved, the question of jurisdiction alone shall be *certified* to the Supreme Court by the court below. Some form of certificate under this clause is essential to the appeal. It must not only appear of record that the question of jurisdiction was involved, but that question, and that alone, must be certified. If there be other questions mixed with the jurisdictional one, and an appeal in general form be allowed without certifying or specifying the question of jurisdiction, the Supreme Court will dismiss the appeal. Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634, S. C. 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Davis & R. Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719; Ansbros v. United States, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; Chappell v. United States, 160 U. S. 507, 40 L. ed. 512, 16 Sup. Ct. Rep. 397. See Scully v. Bird, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597.

In Davis & R. Bldg. & Mfg. Co. v. Barber, 157 U. S. 673, 39 L. ed. 853, 15 Sup. Ct. Rep. 719, the appeal was dismissed because jurisdiction was not directly certified, following. Ibid.; Maynard v. Hecht, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370; Davis v. Geissler, 162 U. S. 290, 40 L. ed. 972, 16 Sup. Ct. Rep. 796; Colvin v. Jacksonville, 157 U. S. 368, 39 L. ed. 736, 15 Sup. Ct. Rep. 634; C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102. Where the decree of the circuit court

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and allowance of appeal states bill was dismissed for want of jurisdiction, no separate certificate is necessary. *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681. There is no question that the certificate required by the act is a prerequisite. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179, 14 Sup. Ct. Rep. 353; *Moran v. Hagerman*, 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 354.

*Form it May Assume.*

What form may the certificate assume?

It may appear in several ways: Either by the terms of the decree and the order allowing the appeal, the record, the opinion of the court, or by separate certificate of the court below, which is the safest proceeding. *Huntington v. Laidley*, 176 U. S. 676, 44 L. ed. 634, 20 Sup. Ct. Rep. 526; *Loeb v. Columbia Twp.* 179 U. S. 483, 45 L. ed. 287, 21 Sup. Ct. Rep. 174; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *United States v. Larkin*, 208 U. S. 333, 52 L. ed. 517, 28 Sup. Ct. Rep. 417; *Van Wagenen v. Sewall*, 160 U. S. 372, 40 L. ed. 461, 16 Sup. Ct. Rep. 370; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Interior Constr. & Improv. Co. v. Gibney*, 160 U. S. 217, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438, 15 Sup. Ct. Rep. 375. If in the decree it should appear that the case was dismissed for the want of jurisdiction only, and a review of the judgment generally is asked by the petition for appeal, and the only question tried below was the jurisdiction, which is clearly apparent in the decree, it has been held that the decree was a sufficient certificate (*Smith v. McKay*, 161 U. S. 357, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Davis v. Cleveland, C. C. & St. L. R. Co.* 217 U. S. 157-171, 54 L. ed. 708-717, 27 L.R.A. (N.S.) 823, 30 Sup. Ct. Rep. 463; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Huntington v. Laidley*, 176 U. S. 677, 44 L. ed. 634, 20 Sup. Ct. Rep. 526); but it must be understood that the court

will not search for it (Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 219, 40 L. ed. 401, 16 Sup. Ct. Rep. 272; Van Wagenen v. Sewall, 160 U. S. 369, 40 L. ed. 460, 16 Sup. Ct. Rep. 370).

The word "certify" need not be used if there is a plain declaration that the single matter sent up is the question of jurisdiction. Ibid.; Chappell v. United States, 160 U. S. 508, 40 L. ed. 513, 16 Sup. Ct. Rep. 397. The entry of a judge, "Appeal allowed," upon a petition, was held not equivalent to a certificate. The Bayonne, 159 U. S. 693, 40 L. ed. 309, 16 Sup. Ct. Rep. 185; Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; Arkansas v. Schliehholz, 179 U. S. 600, 45 L. ed. 336, 21 Sup. Ct. Rep. 229. So filing an assignment of errors and allowance of an appeal is not an equivalent. As said, then, the safest method of proceeding is to apply to the court for a certificate, which should be specific in stating the question of jurisdiction. Ibid.; Carey v. Houston & T. C. R. Co. 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63.

### *Granted in Term.*

It is absolutely necessary that this certificate should be granted during the term at which the judgment was entered (Colvin v. Jacksonville, 158 U. S. 456, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866; Re Lehigh Min. & Mfg. Co. 156 U. S. 327, 39 L. ed. 440, 15 Sup. Ct. Rep. 375; The Bayonne, 159 U. S. 693, 40 L. ed. 309, 14 Sup. Ct. Rep. 185; Chamberlin v. Peoria, D. & E. R. Co. 55 C. C. A. 54, 118 Fed. 32), and that the judgment in which the certificate is granted is *final* (Gates v. Bucki, 53 Fed. 961; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 285, 46 L. ed. 913, 22 Sup. Ct. Rep. 681; McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; Carey v. Houston & T. C. R. Co. 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63; United States v. Jahn, 155 U. S. 109, 39 L. ed. 87, 15 Sup. Ct. Rep. 39); and against the appellant. (Ibid.) It is said in Pullman's Palace Car Co. v.

Central Transp. Co. 71 Fed. 809, that this right of appeal is absolute, and cannot be controlled by the circuit judge to either allow or disallow; the Supreme Court alone determines the right. *Dudley v. Lake County*, 43 C. C. A. 184, 103 Fed. 209.

*Form of Certificate.*

A. B. }  
vs. }  
C. D. J

In the United States Circuit Court  
for the.....District of.....,  
sitting at.....

This cause came on to be heard upon the application for an injunction as prayed in the bill of complaint, and for the appointment of a receiver, etc. (or whatever was the purpose of the bill).

The bill alleged, etc.

The defendant denied the amount in issue exceeded the sum of two thousand dollars, etc. (or state so much of the bill as shows the question involved).

Now, therefore, it is certified that the question of the jurisdiction of this court upon the grounds heretofore stated, to wit: (state the issue) was the issue upon which the case was decided, I having found that (conclusion of court on the issue) it was the duty of the court to dismiss the bill, which was accordingly done (or whatever action was taken); and I further certify that it is the only question of law upon the pleading and process for the decision of the Supreme Court of the United States; that the certificate was granted at the term in which the judgment in the cause was entered.

W. R.,  
United States Circuit Judge.

See *Colvin v. Jacksonville*, 158 U. S. 458, 39 L. ed. 1053, 15 Sup. Ct. Rep. 866, for certificate held sufficient.

This certificate applies where the question of jurisdiction is decided for the defendant and disposes of the case, and it may be signed by the district judge, though the circuit judge decided the case. *Huntington v. Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

The Supreme Court has appellate jurisdiction in bankruptcy proceedings, where amount exceeds two thousand dollars, by appeal direct from the bankruptcy courts. New Code, sec. 252.

## CHAPTER CVI.

### APPEALS UNDER CLAUSES 4, 5, AND 6, OF SECTION 5, ACT OF 1891.

We have so far discussed appeals from the circuit court to the Supreme Court under clause 1 of section 5, act of 1891. Under clauses 4, 5, and 6, of section 5, act of 1891, it is provided that a direct appeal may be taken from the circuit court to the Supreme Court of the United States, when the construction or application of the Constitution of the United States is involved, or the constitutionality of any law of the United States, or the construction or validity of any treaty is drawn in question; or in cases in which the constitution or law of any State is claimed to be in contravention of the Constitution of the United States. The provisions permit, when any of the enumerated Federal questions arise and are the *controlling* questions in the determination of the case, an appeal direct to the Supreme Court from the circuit court, although all other questions were open for determination (see appendix for act of March 3rd, 1891). *Carey v. Houston & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 619, 620, 44 L. ed. 912, 913, 20 Sup. Ct. Rep. 822. And if the jurisdiction of the circuit court rests on the ground that the suit arises under any of these clauses, then the jurisdiction of the Supreme Court is exclusive. *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 728; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 407, 48 L. ed. 499, 24 Sup. Ct. Rep. 376; *Wright v. MacFarlane*, 58 C. C. A. 570,

122 Fed. 770; *Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 783; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Boston & M. R. Co. v. Gokey*, 79 C. C. A. 64, 149 Fed. 44, 9 A. & E. Ann. Cas. 384; *Waterford v. Elson*, 78 C. C. A. 675, 149 Fed. 91; *Halpin v. Amerman*, 70 C. C. A. 462, 138 Fed. 548; *St. Louis Cotton Compress Co. v. American Cotton Co.* 60 C. C. A. 80, 125 Fed. 196. But if the jurisdiction of the circuit court attaches on ground of diversity, and afterwards issues are raised under these clauses, then you may go direct to the Supreme Court, or to the circuit court of appeals. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452; *Spreckles Sugar Ref. Co. v. McClain*, 192 U. S. 407, 408, 48 L. ed. 499, 500, 24 Sup. Ct. Rep. 376; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498. But the option is lost by taking an appeal to the circuit court of appeals. *McFadden v. United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490; *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

It is said in *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196, that when the jurisdiction of the circuit court is invoked solely on the ground of diversity of citizenship, two classes of cases may arise, one in which any of the questions expressed in section 5 of the act of 1891 may appear in the prosecution of the case, and another class where other questions of Federal character not expressed in section 5 may arise. In the first class of cases you may appeal direct to the Supreme Court or go to the circuit court of appeals, and in the second class you must appeal to the circuit court of appeals, and its judgment will be final, and you can therefore only reach the Supreme Court by certiorari.

But when an appeal under any of these clauses is taken, it must really and substantially appear that it involves a dispute or controversy under one or more of them, and that an issue is presented upon the determination of which the suit depends. *Cincinnati, H. & D. R. Co. v. Thiebaud*, 177 U. S. 619, 44 L. ed. 912, 20 Sup. Ct. Rep. 822; *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 728. The Federal ques-

tion must be the controlling one, and real and substantial (*Carey v. Houston, & T. C. R. Co.* 150 U. S. 181, 37 L. ed. 1044, 14 Sup. Ct. Rep. 63; *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Scott v. Donald*, 165 U. S. 73, 74, 41 L. ed. 633, 634, 17 Sup. Ct. Rep. 265; *Lampasas v. Bell*, 180 U. S. 282, 45 L. ed. 530, 21 Sup. Ct. Rep. 368); and it must so appear in the record by a statement in legal and logical form, such as is required in good pleading (*Lampasas v. Bell*, 180 U. S. 283, 45 L. ed. 530, 21 Sup. Ct. Rep. 368; *Western U. Teleg. Co. v. Ann Arbor R. Co.* 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; *Press Pub. Co. v. Monroe*, 164 U. S. 111, 41 L. ed. 369, 17 Sup. Ct. Rep. 40; *World's Columbian Exposition v. United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 667).

You will notice that there is no limitation in these clauses as in the first clause, confining the investigation of the Supreme Court to question of jurisdiction alone, nor is a certificate, as under the first clause, required. *Robinson v. Caldwell*, 165 U. S. 362, 41 L. ed. 746, 17 Sup. Ct. Rep. 343. So when the Supreme Court does take jurisdiction under any or all of these three clauses, it will decide all other questions involved in the case. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 217, 47 L. ed. 780, 23 Sup. Ct. Rep. 498; *Chappell v. United States*, 160 U. S. 509, 40 L. ed. 513, 16 Sup. Ct. Rep. 397; *Press Pub. Co. v. Monroe*, 164 U. S. 111, 41 L. ed. 369, 17 Sup. Ct. Rep. 40; *Scott v. Donald*, 165 U. S. 72, 73, 41 L. ed. 632, 634, 17 Sup. Ct. Rep. 265; *Horner v. United States*, 143 U. S. 577, 36 L. ed. 269, 12 Sup. Ct. Rep. 522.

### *May the Circuit Court of Appeals Determine Questions of Jurisdiction.*

To emphasize the jurisdiction of the Supreme Court in cases involving causes for appeal under section 5, I will briefly discuss whether the *circuit court of appeals can determine* the question of the jurisdiction of the lower court, when properly raised; that is, in view of the act of 1891, can a circuit court of appeals ever determine the issue of the jurisdiction of the trial court in causes appealed to it, in which that issue is raised? In *Rust v. United Waterworks Co.* 17 C. C. A. 16, 56 U. S.

App. 167, 70 Fed. 132, it is held that when a final judgment is rendered in the circuit or district courts of the United States, in which the issue of jurisdiction was raised below, that if the losing party should elect to take the whole case to the circuit court of appeals, it can determine the jurisdiction of the court below with the other issues of law, and fact.

In the fifth circuit, Judge Pardee, in *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 509, and cases cited, in construing section 5 of the act of 1891, in the light of *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, and the *Carey Case* in 150 U. S. 171, 37 L. ed. 1042, 14 Sup. Ct. Rep. 63, decides that the question of the jurisdiction of the trial court can be considered with the other issues in the case, *Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 371; *The Presto*, 35 C. C. A. 394, 93 Fed. 522, and says that the statement that the question of jurisdiction be certified to the Supreme Court by the circuit court of appeals does not make it obligatory, but is a matter of discretion when needing instruction on the point. *United States v. Jahn*, 155 U. S. 109-114, 39 L. ed. 87-90, 15 Sup. Ct. Rep. 39; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *McGilvra v. Ross*, 90 C. C. A. 398, 164 Fed. 604, 605; *Rust v. United Water Works Co.* 17 C. C. A. 16, 36 U. S. App. 167, 70 Fed. 132; *Pikes Peak Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Boston & M. R. Co. v. Gokey*, 210 U. S. 155, 52 L. ed. 1002, 28 Sup. Ct. Rep. 657; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 663; *Crabtree v. Madden*, 4 C. C. A. 408, 12 U. S. App. 159, 54 Fed. 426; *Barling v. Bank of British N. A.* 1 C. C. A. 510, 7 U. S. App. 194, 50 Fed. 260; *King v. McLean Asylum*, 12 C. C. A. 139, 21 U. S. App. 407, 64 Fed. 327; *American Sugar Ref. Co. v. Johnson*, 9 C. C. A. 110, 13 U. S. App. 681, 60 Fed. 503-508; *Baltimore & O. R. Co. v. Meyers*, 10 C. C. A. 485, 18 U. S. App. 569, 62 Fed. 371; *Texas & P. R. Co. v. Bloom*, 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979; *Green v. Mills*, 30 L.R.A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852.

It is apparent, then, from the cases, when the judgment of



the court below is not upon the question of jurisdiction alone, but upon various issues involving the merits of the case, and an appeal has been taken on the whole case to the circuit court of appeals, that court may decide the whole case, and the question of jurisdiction must be left with that court to decide whether it is of sufficient gravity to warrant its submission to the Supreme Court. *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 401, and authorities cited.

In the second circuit it is held that when the pleadings and proof do not show diversity, the circuit court of appeals cannot determine the question. *Sun Printing & Pub. Asso. v. Edwards*, 58 C. C. A. 162, 121 Fed. 827. See, also, *United States v. Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 467; and *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 534. But if the case involves other questions on the merits, the circuit court of appeals may decide them and certify the jurisdictional question to the Supreme Court.

*Jurisdiction of Circuit Court of Appeals When Case Based on  
Clauses 4, 5 and 6.*

We may now inquire if the court of appeals can take jurisdiction of cases involving grounds of appeal set forth in clauses 4, 5, and 6 of section 5 of the act of 1891, which provide for an appeal direct to the Supreme Court.

It has been decided that when cases arise which are controlled by a construction or application of the Constitution of the United States, a direct appeal lies to the Supreme Court, and if carried to the circuit court of appeals those courts may decline to take jurisdiction. *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Kentucky State Bd. of Control v. Lewis*, 100 C. C. A. 208, 176 Fed. 556. But when questions designated in these clauses are mixed with other questions in the case going to the merits, those courts may take jurisdiction and certify the constitutional question, which being answered, they may proceed to judgment, or those courts may decide the case on the merits in the first instance. *Wirgaman v. Persons*, 62 C. C. A. 63, 126 Fed. 449-455 see cases cited; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 282,

45 L. ed. 862, 21 Sup. Ct. Rep. 646; *Reliable Incubator & Brooder Co. v. Stahl*, 44 C. C. A. 657, 105 Fed. 663; *Campbell v. Golden Cycle Min. Co.* 73 C. C. A. 260, 141 Fed. 610; *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 898; *Re Can Pon*, 93 C. C. A. 635, 168 Fed. 479, 482; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Harris v. Rosenberger*, 13 L.R.A. (N.S.) 762, 76 C. C. A. 225, 145 Fed. 451; *United States v. Lee Yen Tai*, 51 C. C. A. 299, 113 Fed. 467. The circuit court of appeals may, under these conditions, certify the jurisdictional question, but is under no obligation to do so. *Weber Bros. v. Grand Lodge, F. & A. M.* 96 C. C. A. 410, 171 Fed. 840 and cases cited.

We have already seen that where jurisdiction depends on diversity of citizenship, and it turns out that the case involves the construction or application of the Constitution of the United States, or any question under the fourth, fifth, and sixth clauses of section 5 of the act of 1891, the circuit court of appeals may certify the constitutional question, or may decide the whole case. The court having jurisdiction by diversity of citizenship only, the mere fact that one or more of the constitutional questions referred to in section 5 arose subsequently would not deprive the court of appeals of jurisdiction, or justify it in declining to exercise it. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Love v. Busch*, 73 C. C. A. 545, 142 Fed. 429; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Pikes Peake Power Co. v. Colorado Springs*, 44 C. C. A. 333, 105 Fed. 1; *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 524.

In *Alton Water Co. v. Brown*, 92 C. C. A. 598, 166 Fed. 840 it is said that giving exclusive appellate jurisdiction to the Supreme Court under the act of 1891 is limited. (1) to cases where the jurisdiction of the Federal Court, as such, is put in issue; (2) to an issue as to whether defendant has been served with proper process. To determine, then, where to appeal, the rule may be stated, where a Constitutional question is involved, and the jurisdiction of the circuit court is originally invoked upon it, the appeal must be to the Supreme Court

only: the circuit court of appeals cannot decide it. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 291, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Carter v. Roberts*, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; *Evans-Snider-Buel Co. v. McCaskill*, 41 C. C. A. 577, 101 Fed. 658; *St. Clair County v. Interstate Sand & Car Transfer Co.* 49 C. C. A. 169, 110 Fed. 785 and cases cited; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646, S. C. 43 C. C. A. 393, 104 Fed. 2; *Owensboro v. Owensboro Waterworks Co.* 53 C. C. A. 146, 115 Fed. 318; *Barr v. New Brunswick*, 19 C. C. A. 71, 39 U. S. App. 187, 72 Fed. 689; *Fisheries Co. v. Lennen*, 65 C. C. A. 79, 130 Fed. 533; *Davis & R. Bldg. & Mfg. Co. v. Barber*, 9 C. C. A. 79, 18 U. S. App. 476, 60 Fed. 465; *Seattle v. Thompson*, 52 C. C. A. 44, 114 Fed. 96. If, however, diverse citizenship is set up as well as the constitutional question, an appeal can be taken to the circuit court of appeals, and a writ of error from its decision to the Supreme Court (*Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Wright v. MacFarlane Co.* 58 C. C. A. 570, 122 Fed. 774, 775); or direct to the Supreme Court (*Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498).

To illustrate: If the case *depends* on the construction or application of the Constitution of the United States, or a case in which a State law is claimed to be in contravention thereof, the circuit court of appeals has no jurisdiction, and the appeal must be dismissed, if the jurisdiction of the circuit court was based on the constitutional question. *Ibid.*; *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753, 754; *Chicago, M. & St. P. R. Co. v. Evans*, 7 C. C. A. 290, 19 U. S. App. 233, 58 Fed. 433; *Re Abbey Press*, 67 C. C. A. 161, 134 Fed. 55; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223. However, as said in *Harris v.*

Rosenberger, 13 L.R.A.(N.S.) 762, 76 C. C. A. 225, 145 Fed. 449, though there be no diversity of citizenship, and the validity of an act of Congress is in issue, if the case also involves the proper construction of an act of Congress, the jurisdiction of the Supreme Court is not exclusive (*Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Rider v. United States*, 79 C. C. A. 112, 149 Fed. 170); or where matters are involved with the constitutional question not within the exclusive jurisdiction of the Supreme Court (*Hooper v. Remmel*, 91 C. C. A. 322, 165 Fed. 338), as *where* the only and controlling question is, would the proposed acts of a municipal corporation deprive the applicant of property without due process of law (*Barr v. New Brunswick*, 19 C. C. A. 71, 39 U. S. App. 187, 72 Fed. 689; *Hastings v. Ames*, 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726); or where a city ordinance is held to discriminate against commerce (*Macon v. Georgia Packing Co.* 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498); or the case depends on the constitutionality of State statutes (*Wrightman v. Boone County*, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 437; *Wright v. MacFarlane*, 58 C. C. A. 570, 122 Fed. 773; *Illinois C. R. Co. v. Adams*, 35 C. C. A. 635, 93 Fed. 856; *Pauley Jail Bldg. & Mfg. Co. v. Crawford County*, 28 C. C. A. 579, 56 U. S. App. 53, 84 Fed. 942).

## CHAPTER CVII.

### APPEAL TO CIRCUIT COURT OF APPEALS.

#### *Jurisdiction.*

I have incidentally discussed the jurisdiction of the circuit court of appeals under the clauses of section 5 of the act of 1891. I will now take up section 6 of that act, that provides "that the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or writ of error *final* decisions of the district and circuit courts of the United States in *all* cases other than those provided for in section 5, unless otherwise provided by law, and the judgments or decrees of the circuit court of appeals shall be *final* in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, revenue laws, and in admiralty cases." Power is further granted to these courts to certify in every case within its appellate jurisdiction any question or proposition of law concerning which it desires instruction. New Code, Sec. 128.

The Supreme Court is authorized in those cases made *final* in the circuit court of appeals, to have sent up by certiorari, or otherwise, any such case for its review and determination. It is further provided that in all cases not made final in the circuit court of appeals, the case may be taken to the Supreme Court for review on appeal or writ of error, where the matter in controversy shall exceed one thousand dollars besides costs, and one year is given within which an appeal can be taken from the circuit court of appeals to the Supreme Court. New Code, sec. 240.

Such is the statute fixing the jurisdiction of the circuit court of appeals, and it is seen that it is wholly appellate (Travis

County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 690), and confined to a revision of the decisions in the district and circuit courts of the United States. Its mission seems to be to settle property rights, rather than to determine constitutional questions, as it is excluded from reviewing cases arising under section 5, already discussed. It is further excluded from reviewing cases "otherwise provided for by law," and it is suggested by Mr. Curtis that this term covers—

First. Cases in which the decision of the district or circuit court is final, as where a circuit court remands a case to a State court.

Second. Cases where the United States Supreme Court exercises appellate revision in habeas corpus and mandamus proceedings, or any other method than by appeal or writ of error.

Third. To some exceptional revenue cases.

In *The Habana*, 175 U. S. 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290, it is said the words refer to provisions of the same, or contemporaneous acts, or subsequent acts of Congress, and do not include provisions of earlier statutes. The circuit courts of appeals have no power to review judgments of State supreme courts (*Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 50); nor judgments of the circuit or district courts of the United States by certiorari (*Travis County v. King Iron Bridge & Mfg. Co.* 34 C. C. A. 620, 92 Fed. 690; *United States ex rel. Montana Ore Purchasing Co. v. Circuit Ct.* 61 C. C. A. 314, 126 Fed. 169).

It is not necessary to pursue the provisions of the act any further to determine when equity causes may be appealed to the circuit court of appeals. The method of exclusion provided by the sixth section fixes affirmatively what cases are within the appellate jurisdiction of these courts.

### *Practice in Appeals and Forms to Be Used.*

I have already called your attention to section 11 of the act of 1891, providing that appeals under the act are to be regulated by existing statutes and rules of court, including the provision for bonds, or other security required on appeals, or writ of error, and that judges have the same power as to allowing

appeals as now belong by law to such judges and justices. See U. S. Rev. Stat. sects. 997 to 1013, U. S. Comp. Stat. 1901, pp. 712 to 716, relating to practice on appeal or error; see, also Rules of Supreme Court of the United States; Act of 1891, sec. 11; Northern P. R. Co. v. Amato, 1 C. C. A. 468, 1 U. S. App. 113, 49 Fed. 881; Simpson v. First Nat. Bank, 63 C. C. A. 371, 129 Fed. 258. New Code, sec. 132, chap. 6.

### *Time For Appealing.*

If aggrieved by the decision, you may appeal at once, that is, during the term, or you have six months after the entry of the final decree to take an appeal (Act of 1891, sec. 11. Rule 16, 90 Fed. CLIX; Cocke v. Copenhaver, 61 C. C. A. 211, 126 Fed. 147; Condon v. Central Loan & T. Co. 20 C. C. A. 110, 36 U. S. App. 579, 73 Fed. 907; Travis County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 690; Blaffer v. New Orleans Water Supply Co. 87 C. C. A. 341, 160 Fed. 389, 390, and cases cited; Waxahachie v. Coler, 34 C. C. A. 349, 92 Fed. 284; Meyer v. Hot Springs Imp. Co. 95 C. C. A. 156, 169 Fed. 628; Born v. Schneider, 128 Fed. 179; Connecticut F. Ins. Co. v. Oldendorff, 19 C. C. A. 379, 44 U. S. App. 487, 73 Fed. 89; Hudson v. Limestone Natural Gas Co. 75 C. C. A. 678, 144 Fed. 952; Butt v. United States, 126 Fed. 794; Green v. Lynn, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 839; Noonan v. Chester Park Athletic Club Co. 35 C. C. A. 457, 93 Fed. 576; Coe v. East & W. R. Co. 29 C. C. A. 292, 52 U. S. App. 532, 85 Fed. 489; Threadgill v. Platt, 71 Fed. 3. It must not only be allowed, but must be issued within the time. Ibid.; Stevens v. Clark, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 321; Blaffen v. New Orleans Water Supply Co. 160 Fed. 391; Scarborough v. Pargoud, 108 U. S. 567, 27 L. ed. 824, 2 Sup. Ct. Rep. 877); unless in the particular character of case less time is fixed by law governing appeals and writs of error when the act was passed. Act of 1891, sec. 11. It will be noticed that section 11 of the act of 1891 only applies to appeals to the circuit court of appeals. (See Appendix.)

In appealing to the Supreme Court direct, the act of 1891

does not apply, so we must look at the law fixing the time within which the appeal to the Supreme Court must be taken, U. S. Rev. Stat., sect. 1008, U. S. Comp. Stat. 1901, p. 715, which fixes two years from the *entry* of the order, except when a disability intervenes, then the time begins from its removal. *Andrews v. Thum*, 18 C. C. A. 566, 33 U. S. App. 430, 72 Fed. 290; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840. In computing the time the day on which the decree is entered is excluded, and when an application for rehearing is filed and entertained, then time begins when the application is overruled. *Andrews v. Thum*, 18 C. C. A. 566, 33 U. S. App. 430, 72 Fed. 290; *S. C. 12 C. C. A. 77*, 21 U. S. App. 459, 64 Fed. 149; *Louisville Trust Co. v. Stockton*, 18 C. C. A. 408, 41 U. S. App. 579, 72 Fed. 1; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 36, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Alexander v. United States*, 6 C. C. A. 602, 15 U. S. App. 158, 57 Fed. 828; *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 678, 42 L. ed. 1193, 18 Sup. Ct. Rep. 786; *Texas & P. R. Co. v. Murphy*, 111 U. S. 489, 28 L. ed. 493, 4 Sup. Ct. Rep. 497; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; See *Marks v. Northern P. R. Co.* 22 C. C. A. 630, 44 U. S. App. 714, 76 Fed. 941; *Duncan v. Atlantic, M. & O. R. Co.* 4 Hughes, 125, 88 Fed. 840. If the last day for an appeal falls on Sunday, or a *dies non* you had better perfect the appeal the day before. *Johnson v. Meyers*, 4 C. C. A. 399, 12 U. S. App. 220, 54 Fed. 417; *Meyer v. Hot Springs Imp. Co.* 95 C. C. A. 156, 169 Fed. 629.

When the appeal is filed after six months under the act of 1891, it will be dismissed. *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *Coulliette v. Thomason*, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787; *Hamilton v. Brown*, 3 C. C. A. 639, 2 U. S. App. 540, 53 Fed. 753. The court has no jurisdiction of an appeal filed after the time. *Union P. R. Co. v. Colorado, Eastern R. Co.* 4 C. C. A. 161, 12 U. S. App. 110, 54 Fed. 22; *White v. Iowa Nat. Bank*, 17 C. C. A. 621, 36 U. S. App. 260, 71 Fed. 97; *Condon v. Central Loan & T. Co.* 20 C. C. A. 110, 36 U. S. App. 579, 73 Fed. 907.



*When is Appeal Said to Be Taken.*

The question arises, when is the appeal said to be "taken" so as to save the bar? The appeal is taken when *allowed* by the court (*Credit Co. v. Arkansas C. R. Co.* 128 U. S. 261, 32 L. ed. 449, 9 Sup. Ct. Rep. 107; See "Allowance of Appeal"); and the filing of the bond and issuance of citation after six months will not bar the appeal, as neither requirement is jurisdictional, that is to say, the allowance of the appeal in six months as stated is sufficient, as neither the filing of the bond or issuing citation is jurisdictional. *Noonan v. Chester Park Athletic Club Co.* 35 C. C. A. 457, 93 Fed. 576; *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851. See *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980).

There may be, because of separable controversies created by the bill, cross bills or interventions, several final appealable decrees, and the time for appealing will date from the entry of the particular decree. In discussing "cross" appeals, it will be seen that they are governed by the same time limit.

*Notice of Appeal.*

Having seen the time within which one must act who desires an appeal, the next step is to give "notice of appeal," and have the amount of the bond fixed. You may give this notice of appeal in open court, or within the six months allowed. If notice is given in open court when the case is decided, and the bond fixed by the court is filed and accepted by the judge during the term in which the decree is rendered, and the appeal thus perfected, this will be an "allowance" of the appeal, and no petition is necessary; provided, however, that you assign errors at once, for by rules now in force, an assignment of errors must be filed before an appeal should be allowed. See Rule 11, Circuit Court of Appeals; "Assignments of Errors." The rule is applicable to equity causes as well as writs of error. *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 261.

If the appeal thus allowed in open court is perfected by filing in the appellate court the transcript and docketing the case within the required time, the issuance and service of a citation to the adversary party is not necessary. *Richardson v. Green*, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; *Jacobs v. George*, 150 U. S. 416, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Central Trust Co. v. Continental Trust Co.* 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 524; *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186; *Dodge v. Knowles*, 114 U. S. 430, 438, 29 L. ed. 144, 297, 5 Sup. Ct. Rep. 1108, 1197. If you have given notice of appeal in open court, but you have not given bond, or the security required during the term, then your notice is of no avail, and you must have issued and served on the opposite party or his counsel a citation, in form as will be hereafter given, unless waived. *Richardson v. Green*, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; *Radford v. Folsom*, 123 U. S. 727, 31 L. ed. 293, 8 Sup. Ct. Rep. 334; *Brown v. McConnell*, 124 U. S. 491, 31 L. ed. 496, 8 Sup. Ct. Rep. 559; *First Nat. Bank v. Omaha*, 96 U. S. 738, 24 L. ed. 881; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319.

If you do not give notice in open court, but determine afterwards to appeal, you must present a petition to the judge of the district, a circuit judge of the circuit, or the justice assigned to the circuit for permission to appeal, and citation must issue and be served. *Haskins v. St. Louis & S. E. R. Co.* 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643; *Ruby v. Atkinson*, 35 C. C. A. 458, 93 Fed. 579. But failure to serve in time does not necessarily dismiss the appeal. *Richards v. Mackall*, 113 U. S. 542, 28 L. ed. 1133, 5 Sup. Ct. Rep. 535; see *Pierce v. Cox*, 9 Wall. 787, 19 L. ed. 786. At the same time request that the amount of the bond be fixed, and file concurrently with these acts an assignment of errors in the clerk's office, presenting your grounds of objection, which must be confined to questions raised through the trial, or that are apparent in the record.

### *Petition for Appeal.*

If the appeal is perfected in open court, the petition and

citation is not necessary, for the transcript showing the appeal was taken in open court gives the appellate court jurisdiction; but if the appeal is taken after the term, though notice may have been given in open court, then you must file a petition as follows:

Title as in bill. }  
No. of case. } In Equity.

Petition for Appeal filed....., A.  
D. 19..., in the Circuit Court of the  
United States for.....District.

*To the Hon....., District Judge, etc.:*

The above named plaintiff (or defendant) feeling himself aggrieved by the decree made and entered in this cause on the.....day of....., A. D. 19..., does hereby appeal from said decree (or order) to the Circuit Court of Appeals for the.....Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for.....Circuit, sitting at .....

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

R. F.,  
Solicitor.

*Tefft v. Stern*, 21 C. C. A. 73, 43 U. S. App. 442, 74 Fed. 755.

If you desire a supersedeas, add "and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued." The judge usually endorses the petition.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of.....dollars.

A. B.,  
Judge, etc.

See *Columbus Chain Co. v. Standard Chain Co.* 76 C. C. A. 164, 145 Fed. 186, 187.

"Or the appeal is allowed and shall operate as a supersedeas upon the petitioner filing a bond in the sum of.....dollars, with sufficient sureties to be conditioned as required by law." (See chapter 110.)

As said before, the judge of the district in which the case is tried, or the circuit judge of the circuit, or the justice assigned to the circuit, can act upon the petition (Rule 35, 79 C. C. A. liv. 90 Fed. lxvi. *United States v. Moy Yee Tai*, 48 C. C. A. 203, 109 Fed. 2; *Brown v. McConnell*, 124 U. S. 489-491, 31 L. ed. 495-497, 8 Sup. Ct. Rep. 559; *Copper River Min. Co. v. McClellan*, 70 C. C. A. 623, 138 Fed. 338), but cannot allow an appeal from another district while sitting in his own district (*United States v. Moy Yee Tai*, *supra*). The act is not altogether ministerial in granting appeals, it is not a matter of course, says *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 355-363; *Brinkley v. Louisville & N. R. Co.* 95 Fed. 345-351. However, in *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, it is said the right of appeal is an absolute right, and no judge can condition the allowance, the procedure having been complied with. The judge passes on only the sufficiency of the security. *Pullman's Palace Car Co. v. Central Transp. Co.* 71 Fed. 809. There are cases where they have been disallowed, that is considered not appealable; but not where appealable, however frivolous (*Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 325; *Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 1); it is a matter of right, and mandamus will lie. *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. ed. 123, 125; *Thorn v. Pittard*, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 235.

### *Motion for Supersedeas.*

When bond has been given in time, and appellee seeks to have some action taken in the court below, you may enjoin the action, and move for a supersedeas after the appeal. *Washington, G. & A. R. Co. v. Bradley* (*Washington, G. & A. R. Co. v. Washington*) 7 Wall. 577, 19 L. ed. 274; *Slaughter-house Cases*, 10 Wall. 293, 19 L. ed. 921. The petition should be addressed to the circuit court of appeals, and in the following form:

Title as in appeal. In Equity.

Address Circuit Judges.

And now comes the appellant, A. B., in the above entitled cause and would show unto your Honors that on the ..... day of ....., A. D.

19..., this cause came on to be heard before the Hon. ...., judge of the.....district of....., sitting at....., and that on the .....day of....., A. D. 19..., a decree was entered in said cause in substance as follows (state fully the decree that the court may determine whether it be final).

That petitioner appealed from said decree, which said appeal was allowed on the.....day of....., A. D. 19..., and security given conditioned as provided by law, as will appear, reference being had to the proceedings here on file in this Honorable Court. That said security thus taken was such as properly to operate as a supersedeas to stay all proceedings while this cause is pending on appeal before this Honorable Court.

Petitioner shows that, notwithstanding the allowance of the appeal in this cause, and the filing the security for its prosecution as aforesaid, appellees are seeking to take further proceedings in the court below (here state them). That said proceedings will work an injury and injustice to petitioner if permitted.

Wherefore petitioner prays this Honorable Court to issue a writ of supersedeas to the United States Circuit Court for the.....District of ....., its judges, clerk and marshal, staying and enjoining said court, its judges, clerk and marshal, from taking or suffering to be taken before them any further proceedings herein until the hearing and decision by this court of the appeal taken herein and the return of the mandate thereon, and for such further relief as to this court may seem proper, and petitioner will ever pray, etc.

If granted, draw the decree containing substantially the prayer of the petition or in whatever form it may be granted. The writ issued is as follows:

#### UNITED STATES OF AMERICA.

The President of the United States to the Judges of the Circuit Court of the United States for the.....District of....., and to the Clerk and Marshal of said District—Greeting:

Whereas an appeal has heretofore been taken to the United States Circuit Court of Appeals for the.....Circuit from a certain final decree entered in the United States Circuit Court for the.....District of .....on the.....day of....., A. D. 19..., in a certain cause wherein A. B. is complainant and appellant and C. D. is defendant and appellee; and whereas said appeal was taken and good and sufficient security was given in time to operate by virtue of the statute in such cases made and provided as a supersedeas and stay of all proceedings in said cause in said circuit court; now, therefore, we being willing that full justice should be done the said A. B., petitioner in this behalf, and that his rights should be fully protected, do command and enjoin you to refrain from taking or suffering to be taken before you any proceedings whatsoever, and especially (state proceedings sought to be taken) until the hearing and decision of this court on the appeal taken herein and the return to you of the mandate thereon.

Witness the Hon....., Chief Justice of the Supreme Court of the United States, this.....day of....., A. D. 19...

Attest:

Clerk

Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 160; Tuttle v. Clafin, 13 C. C. A. 281, 26 U. S. App. 678, 66 Fed. 8.

When an appeal is properly filed, appellant court may issue supersedeas to lower court on filing bond in the appellate court, if done in time. U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714, sec. 716, U. S. Comp. Stat. 1901, p. 580; Bound v. South Carolina R. Co. 55 Fed. 188; Kitchen v. Randolph, 93 U. S. 88, 23 L. ed. 810; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 397; Peugh v. Davis, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17; Hudgins v. Kemp, 18 How. 535, 15 L. ed. 513; Slaughter-house Cases, 10 Wall. 291, 19 L. ed. 920; Union Mut. L. Ins. Co. v. Windett, 36 Fed. 839; Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654; Washington, G. & A. R. Co. v. Bradley (Washington, G. & A. R. Co. v. Washington), 7 Wall. 577, 19 L. ed. 274; Western U. Teleg. Co. v. Eyser, 19 Wall. 428, 22 L. ed. 44; Baltimore & O. R. Co. v. Harris, 7 Wall. 574, 19 L. ed. 100; French v. Shoemaker, 12 Wall. 100, 20 L. ed. 271.

## CHAPTER CVIII.

### ASSIGNMENT OF ERRORS.

With the petition for appeal must be assigned the matters complained of, and to correct which the appeal is prayed for, and this must be done whether the appeal be direct to the Supreme Court or the circuit court of appeals. (See "Notice of Appeal.") *United States v. Goodrich*, 4 C. C. A. 160, 12 U. S. App. 108, 54 Fed. 21; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 257; *Mutual L. Ins. Co. v. Conoley*, 11 C. C. A. 116, 25 U. S. App. 86, 63 Fed. 180; *Webber v. Mihills*, 59 C. C. A. 577, 124 Fed. 64; *Moore v. Moore*, 58 C. C. A. 19, 121 Fed. 737. As to evidence of filing. *Copper River Min. Co. v. McClellan*, 70 C. C. A. 623, 138 Fed. 333; *Lockman v. Lang*, 62 C. C. A. 530, 128 Fed. 280, S. C. 65 C. C. A. 621, 132 Fed. 1. Rule 35 of the Supreme Court rules requires that the appellant shall file with the clerk below, with his petition for an appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, and no appeal shall be allowed unless it is filed, and errors not assigned will be disregarded. Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii. U. S. Rev. Stat. sec. 937, U. S. Comp. Stat. 1901, P. 690; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23; *The Myrtie M. Ross*, 87 C. C. A. 175, 160 Fed. 19; *Stillwagon v. Baltimore & O. R. Co.* 86 C. C. A. 287, 159 Fed. 97; *Norfolk & W. R. Co. v. Gardner*, 89 C. C. A. 114, 162 Fed. 114. In *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, it is held that it is not necessary to assign errors before an appeal is allowed, as in an application for a writ of error, but the assignment may be filed at any time before the security is approved and accepted.

Rule 11 of the circuit court of appeals rules requires that the appellant shall file with the clerk below with his petition

an assignment of errors, and no appeal shall be allowed until the assignment of errors has been filed. This assignment forms part of the transcript, and must be printed with it. See Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii.; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913; *Coulliette v. Thomason*, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787; See *P. P. Mast & Co. v. Superior Drill Co.* 83 C. C. A. 157, 154 Fed. 45; *Norfolk & W. R. Co. v. Gardner*, 89 C. C. A. 114, 162 Fed. 115.

The purpose of the assignment is to advise the court of the questions it is called upon to decide, without going beyond the assignment itself, and it states the limits within which the appellant will be confined in presenting objections to the proceedings below. *Grape Creek Coal Co. v. Farmer's Loan & T. Co.* 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; *Findlay v. Pertz*, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 685; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408-415, 36 L. ed. 485-488, 12 Sup. Ct. Rep. 679; *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166.

### *Cross Errors.*

Cross errors are not assignable in the Federal Courts. *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606; citing, *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 170-173; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 567.

### *Must Be Specific.*

The assignment must not be argumentative, but direct (Rule 11 C. C. A.; *Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23); not general but specific (*Richardson v. Walton*, 9 C. C. A. 604, 17 U. S. App. 525, 61 Fed. 535; *Mitchell Transp. Co. v. Green*, 56 C. C. A. 455, 120 Fed. 49; *Baltimore v. Maryland*, 92 C. C. A. 335, 166 Fed. 645, and cases cited. *Florida C. & P. R. Co. v. Cutting*, 15 C. C. A. 597, 30 U. S. App. 428, 68 Fed. 586; *Guggenheim v. Kirchhofer*, 14 C. C. A. 72, 26 U. S. App. 664, 66 Fed. 755;



Randolph v. Allen, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23; Hart v. Bowen, 31 C. C. A. 31, 58 U. S. App. 184, 86 Fed. 877; Findlay v. Pertz, 20 C. C. A. 662, 43 U. S. App. 383, 74 Fed. 681, 682; Adams v. Shirk, 44 C. C. A. 653, 105 Fed. 659; Anniston v. Safe Deposit & T. Co. 29 C. C. A. 457, 52 U. S. App. 510, 85 Fed. 856); for if it points out no particular error, it will not be noticed; Deering Harvester Co. v. Kelly, 43 C. C. A. 225, 103 Fed. 261; (U. S. Rev. Stat. sec. 997, U. S. Comp. Stat. 1901, p. 712; Ibid.; Supreme Council, C. K. A. v. Fidelity & C. Co. 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 49; see Rule 24, 79 C. C. A. xxxiii., 150 Fed. xxxiii.; Flagler v. Kidd, 24 C. C. A. 123, 45 U. S. App. 461, 78 Fed. 341; United States v. Ferguson, 24 C. C. A. 1, 45 U. S. App. 457, 78 Fed. 104; National Acci. Soc. v. Spiro, 24 C. C. A. 334, 47 U. S. App. 293, 78 Fed. 774); when error may be noticed though general or not assigned (Rule 24, 79 C. C. A. xxxiii., 150 Fed. xxxiii.; cl. 4; Doan v. American Book Co. 45 C. C. A. 42, 105 Fed. 772; The Myrtie M. Ross, 87 C. C. A. 175, 160 Fed. 22). Thus, to assign that there is error in the decree, in that the court upon the evidence should have decreed for appellant, would be too general (Doe v. Waterloo Min. Co. 17 C. C. A. 190, 44 U. S. App. 204, 70 Fed. 455, 18 Mor. Min. Rep. 265), but you must specify in what respect the decree is erroneous, and your reasons. (Andrews v. National Foundry & Pipe Works, 36 L.R.A. 139, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; McFarlane v. Golling, 22 C. C. A. 23, 46 U. S. App. 141, 76 Fed. 23.)

Your assignment is defective if the court is required to look in the brief for a specific statement of the question presented. Grape Creek Coal Co. v. Farmers' Loan & T. Co. 12 C. C. A. 350, 24 U. S. App. 38, 63 Fed. 891; Hoge v. Magnes, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 355. So, general exceptions to a charge of the court at law are unavailing. Thom v. Pittard, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232; Baltimore v. Maryland, 92 C. C. A. 335, 166 Fed. 645, and cases cited.

### *Form of Assignment.*

Title as in bill.

And now, on this the ..... day of ....., A. D. 19..., came the

defendant by his solicitor, R. F., and says that the decree entered in the above cause on the.....day of....., A. D. 19..., is erroneous and unjust to defendant.

First. Because, etc. (stating specifically and separately each error complained of, and numbering them consecutively).

Wherefore the defendant prays that the said decree be reversed and the circuit court directed to dismiss the bill (or such relief as the nature of the case demands; or if the plaintiff assigns he may pray that the decree be reversed, and the circuit court be instructed to enter such decree as is prayed for by said bill, or that the court of appeals shall reverse and render a proper decree on the record, etc.).

R. F.,  
Solicitor.

### *Time of Filing.*

No appeal will be allowed unless the assignment of errors is filed with the petition. Rule 11, 79 C. C. A. xxvii., 150 Fed. xxvii.; *Mutual L. Ins. Co. v. Conoley*, 11 C. C. A. 116, 25 U. S. App. 86, 63 Fed. 180; *Dufour v. Lang*, 4 C. C. A. 663, 2 U. S. App. 477, 54 Fed. 913, 917; *Savings & Loan Soc. v. Davidson*, 38 C. C. A. 365, 97 Fed. 696; *Flahrity v. Union P. R. Co.* 6 C. C. A. 167, 12 U. S. App. 532, 56 Fed. 908; *Crabtree v. McCurtain*, 10 C. C. A. 86, 19 U. S. App. 660, 61 Fed. 808; *Frame v. Portland Gold Min. Co.* 47 C. C. A. 664, 108 Fed. 751; *United States v. Goodrich*, 4 C. C. A. 160, 12 U. S. App. 108, 54 Fed. 21; *Lockman v. Lang*, 62 C. C. A. 550, 128 Fed. 280. We have seen, in discussing the application of rule 11 C. C. A. and 35 of the Supreme Court, that the rule as stated above is unquestionably correct as to applications for writs of error, but in appeals the assignment of errors may be filed at any time before the security is approved and accepted. *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259; see *Re Olsen*, 40 C. C. A. 247, 100 Fed. 10.

### *Confined to the Issues.*

You cannot import a question by your assignment; the pleadings must develop it. *Zadig v. Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Cornell v. Green*, 163 U. S. 80, 41 L. ed. 78, 16 Sup. Ct. Rep. 969; *Missouri P. R. Co.*

v. Fitzgerald, 160 U. S. 575, 40 L. ed. 540, 16 Sup. Ct. Rep. 389; Woodbury v. Shawneetown, 20 C. C. A. 400, 34 U. S. App. 655, 74 Fed. 205; Cheney v. Bacon, 1 C. C. A. 244, 4 U. S. App. 207, 49 Fed. 305. And while error is assignable to the ruling or order, it is not assignable to reasons given for the ruling or order. Russell v. Kern, 16 C. C. A. 154, 34 U. S. App. 90, 69 Fed. 94; McFarlane v. Golling, 22 C. C. A. 23, 46 U. S. App. 141, 76 Fed. 24, and cases cited. Thus, assignments on the opinion of the court are not noticed. Ibid.; see rule 14 circuit court of appeals, sec. 2; Columbus Safe Deposit Co. v. Burke, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 633; Evans v. Suess Ornamental Glass Co. 28 C. C. A. 24, 53 U. S. App. 567, 83 Fed. 706; North American Loan & T. Co. v. Colonial & U. S. Mortg. Co. 28 C. C. A. 88, 55 U. S. App. 157, 83 Fed. 796; Mutual Reserve Fund Life Assn. v. Du Bois, 29 C. C. A. 354, 56 U. S. App. 586, 85 Fed. 586.

### *Consent Decree.*

Assignments are not allowed on consent decrees, nor upon error in one's favor (McCafferty v. Celluloid Co. 43 C. C. A. 540, 61 U. S. App. 394, 104 Fed. 305; Ritter v. Mutual L. Ins. Co. 169 U. S. 144, 42 L. ed. 694, 18 Sup. Ct. Rep. 300); unless consent is denied, when the issue may be carried up by appeal (Kaw Valley Drainage Dist. v. Union P. R. Co. 90 C. C. A. 320, 163 Fed. 837).

### *To the Admission or Rejection of Evidence.*

By Supreme Court rule 13 and circuit court of appeals rule 12, it is provided that in all cases in equity no objection will be heard to the admission or rejection of evidence of such depositions, deeds, or other exhibits found in the record, unless objection was taken thereto and entered of record in the court below, but the same shall otherwise be deemed to be admitted by consent. Thus, to warrant a consideration of a ruling in evidence in equity, the ruling and exceptions must be taken when admitted or rejected over objections at the time, and it must so appear to have been taken in the record. (See "Bill

of Exceptions.") *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243; *Bunker Hill & S. Min. & Concentrating Co. v. Oberder*, 25 C. C. A. 171, 48 U. S. App. 339, 79 Fed. 726; *Sipes v. Seymour*, 22 C. C. A. 90, 40 U. S. App. 185, 76 Fed. 118.

An assignment of error to the admission or rejection of evidence should quote the full substance of the evidence rejected or admitted. Rule 11, circuit court of appeals rules; rule 35, Supreme Court rules. *Cass County v. Gibson*, 46 C. C. A. 341, 107 Fed. 363; *North Chicago Street R. Co. v. St. John*, 29 C. C. A. 634, 57 U. S. App. 366, 85 Fed. 806; *Haldane v. United States*, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819; *Newman v. Virginia T. & C. Steel & I. Co.* 25 C. C. A. 382, 42 U. S. App. 466, 80 Fed. 231; *Columbus Safe Deposit Co. v. Burke*, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 630; *Gallot v. United States*, 31 C. C. A. 44, 58 U. S. App. 243, 87 Fed. 446; *New Orleans & N. E. R. Co. v. Clements*, 40 C. C. A. 465, 100 Fed. 419; *Ladd v. Missouri Coal & Min. Co.* 14 C. C. A. 246, 32 U. S. App. 93, 66 Fed. 880; see *Hoge v. Magnes*, 29 C. C. A. 564, 56 U. S. App. 500, 85 Fed. 358. General assignments that the court erred in admitting or rejecting evidence will not be considered. *Supreme Council, C. K. A. v. Fidelity & C. Co.* 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 49; *Oswego Twp. v. Travelers' Ins. Co.* 17 C. C. A. 77, 36 U. S. App. 13, 70 Fed. 225; *National Bank v. First Nat. Bank*, 10 C. C. A. 87, 27 U. S. App. 88, 61 Fed. 809. Assignments of error are controlled by Federal, not State law. *Shipman v. Ohio Coal Exch.* 17 C. C. A. 313, 37 U. S. App. 471, 70 Fed. 654.

## CHAPTER CIX.

### ALLOWANCE OF APPEAL.

We have discussed the filing of a petition for an appeal, and the assignment of errors which we have seen should precede the allowance of an appeal. Circuit court of appeals rule 11. We have also seen that an appeal must be allowed, and who should allow the appeal. (See "Petition for Appeal" chapter 107).

See Section 132, New Code, Chapter 6 by whom and how allowed. Effective —January 1st, 1912.

It is said in *Brinkley v. Louisville & N. R. Co.* 95 Fed. 350, 351, that no case can be found authorizing the refusal of an appeal, however frivolous or vexatious. However, this case seems to recognize that it can be done. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 325. The appeal must be allowed (*Barrel v. Western Transp. Co.* [*Barrell v. The Mohawk*] 3 Wall. 424, 18 L. ed. 168; *McCourt v. Singers-Bigger*, 80 C. C. A. 56, 150 Fed. 104; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 326; *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840; *Warner v. Texas & P. R. Co.* 4 C. C. A. 673, 13 U. S. App. 236, 54 Fed. 922; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 390, 391, and cases cited), but the statute makes no provisions in terms for form of allowance (U. S. Rev. Stat. sec. 692, U. S. Comp. Stat. 1901, p. 566), the filing of the petition and assignment of errors within six months is not sufficient (*Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 839). See *Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 286, as to writ of error, and *Blaffer v. New Orleans Water Supply Co.* 160 Fed. 391.

The oral request in open court, or the petition and prayer for appeal in vacation, with the order allowing it, makes a valid appeal. However, it has been held that no formal order

is necessary. *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165-167; and cases cited; *Loveless v. Ransom*, 48 C. C. A. 434, 109 Fed. 391; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989. The signing of the citation by the judge, or the approval of the bond, has been held to allow the appeal. *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 259, and cases cited; *Sage v. Central R. Co.* 96 U. S. 714, 715, 24 L. ed. 643, 644; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 167; see *Brown v. McConnell*, 124 U. S. 490, 31 L. ed. 496, 8 Sup. Ct. Rep. 559; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314, 317; *Brandies v. Cochrane*, 105 U. S. 262, 26 L. ed. 989; *Re Goodman*, 42 C. C. A. 85, 101 Fed. 920; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916; *Re Fiechtl*, 46 C. C. A. 497, 107 Fed. 618; *McDaniel v. Stroud*, 45 C. C. A. 446, 106 Fed. 492; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840.

So it has been held that the bond is not essential (*Edmonson v. Bloomshire*, 7 Wall. 311, 19 L. ed. 92; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786; see "Bond"); that is, an appeal may be perfected notwithstanding security was not given within the time allowed for appeal (*Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851), and it seems allowance of appeal relates back (*Radford v. Folsom*, 123 U. S. 725, 31 L. ed. 292, 8 Sup. Ct. Rep. 334; *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1060, 10 Sup. Ct. Rep. 638; *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493); but the allowance of appeal on condition of giving bond; such appeal is not perfected until bond is given (*Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 1).

### *Allowance in Forma Pauperis.*

27 Stat. at L. 252, chap. 209, U. S. Comp. Stat. 1901, p. 706; *The Presto*, 35 C. C. A. 394, 93 Fed. 522; *Columb v. Webster Mfg. Co.* 76 Fed. 198; *Fuller v. Montague*, 53 Fed. 206; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851. As to the affidavit, see *Re Collier*,

93 Fed. 191; Volk v. B. F. Sturtevant Co. 39 C. C. A. 646, 99 Fed. 533; Donovan v. Salem & P. Nev. Co. 134 Fed. 316, 317; Whelan v. Manhattan R. Co. 86 Fed. 219; McDuffee v. Boston & M. R. Co. 82 Fed. 865; Woods v. Bailey, 111 Fed. 121. There was a great divergence of opinion among the circuit courts as to the application of the act to appeals and writs of error (see Bristol v. United States, 63 C. C. A. 529, 129 Fed. 88, 89, for authorities pro and con); but in Bradford v. Southern R. Co. 195 U. S. 243, 49 L. ed. 178, 25 Sup. Ct. Rep. 55, it is said appeals cannot be taken under the act. This case is followed in Re Bradford, 71 C. C. A. 334, 139 Fed. 518, and Taylor v. Adams Exp. Co. 90 C. C. A. 526, 164 Fed. 616, overruling Reed v. Pennsylvania Co. 49 C. C. A. 572, 111 Fed. 714.

*When Jurisdiction of the Appellate Court Attaches.*

Jurisdiction of the appellate court attaches when the appeal is allowed, provided the appeal has been taken within the time limited. Noonan v. Chester Park Athletic Club Co. 35 C. C. A. 457, 93 Fed. 576 (See "Time for Appealing"). See Morrin v. Lawler, 91 Fed. 694; Columbus Chain Co. v. Standard Chain Co. 76 C. C. A. 164, 145 Fed. 186; Waxahachie v. Coler, 34 C. C. A. 349, 92 Fed. 286; Wickelman v. A. B. Dick Co. 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; Butt v. United States, 126 Fed. 794; Fowler v. Hamill, 139 U. S. 550, 35 L. ed. 266, 11 Sup. Ct. Rep. 663; Whitsitt v. Union Depot & R. Co. 122 U. S. 363, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1248. As we have seen the United States circuit court of appeals has no jurisdiction of appeal not taken within six months from the entry of the judgment. Connecticut F. Ins. Co. v. Oldendorff, 19 C. C. A. 379, 44 U. S. App. 487, 73 Fed. 90, and cases cited; Coulliette v. Thomason, 1 C. C. A. 675, 2 U. S. App. 221, 50 Fed. 787, judiciary act 1891, sec. 11, U. S. Comp. Stat. 1901, p. 753. An appeal in open court is inoperative unless prosecuted within the time (Credit Co. v. Arkansas C. R. Co. 128 U. S. 259-261, 32 L. ed. 449, 450, 9 Sup. Ct. Rep. 107); and it seems that an allowance relates back to date of prayer for.

*Bond.*

The next step is to prepare and file a bond covering the amount required by the court in allowing the appeal, whether it be for costs or a supersedeas. By section 11 of the act of 1891, it is provided that all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in said act in respect to the circuit court of appeals, including all provisions for bonds or other security required or to be taken on such appeals, etc., and any judge of the circuit court of appeals in respect of cases brought, or to be brought to that court, shall have the same powers and duties as to allowance of appeals, etc., and the conditions of such allowance, as now by law belong to judges of the existing courts of the United States respectively.

The provision of law then in force and referred to in this clause of section was U. S. Rev. Stat. sect. 1000, U. S. Comp. Stat. 1901, p. 712, Equity rule 29, requiring the judge to take good security that the appellant shall prosecute his appeal to effect, and if he fail to make good his plea, shall answer all damages and costs, where the writ is a supersedeas and stays execution; or all costs when not a supersedeas. *O'Reilly v. Edrington*, 96 U. S. 724, 24 L. ed. 659. But the bond is not jurisdictional, and may be waived. *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638.

*Amount of Bond.*

By rule 13, circuit court of appeals, it is provided that supersedeas bonds in the circuit and district courts of the United States must be taken with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. When the judgment or decree is for money *not otherwise secured*, the bond should be for the whole amount recovered, and in addition it must cover an amount of the probable damages, costs, and interest which may accrue. 31 C. C. A. liii, 47 Fed. vi. S. C. Rule 32, 6 Wall. v.



If, however, it be a foreclosure, or in suits where the property is in court, or follows the controversy, as in real actions and replevin, then the indemnity required will be the amount sufficient to secure the sum recovered for the use and detention of the property, the costs of suit, just damages for delay, and costs and interest on appeal. *Louisville N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25; *Kountze v. Omaha Hotel Co.* 107 U. S. 389, 27 L. ed. 613, 2 Sup. Ct. Rep. 911, 74 Fed. 1, 2; *Clark v. Patton*, 93 Fed. 342.

This rule is not applicable where no supersedeas is asked (*Wheeling Bridge & Terminal R. Co. v. Cochran*, 15 C. C. A. 321, 25 U. S. App. 306, 68 Fed. 143), and U. S. Rev. Stat. sec. 1000, would apply in such cases. The judge who takes the security on appeal is the sole and exclusive judge of what it should be, and his decision is final, unless he violates a statute or rule of practice. *Jerome v. McCarter*, 21 Wall. 17-33, 22 L. ed. 515-517. See "supersedeas." *Ex parte French*, 100 U. S. 5, 25 L. ed. 530; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289; *Mexican Nat. Constr. Co. v. Reusens*, 118 U. S. 54, 30 L. ed. 78, 6 Sup. Ct. Rep. 945. This rule applies except when the bond has been fraudulently obtained. *Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605.

### *Form of Bond on Appeal.*

Title as in bill

#### *Bond on Appeal.*

Know all Men by these Presents: That we, A. B., as principal, and ..... , as sureties, acknowledge ourselves to be jointly indebted to C. D., appellee in the above cause, in the sum of ..... (as indicated by the judge allowing the appeal), conditioned that, whereas, on the ..... day of ..... , A. D. 19... , in the Circuit Court of the United States for the ..... District of ..... , in a suit depending in that court, wherein A. B. was plaintiff and C. D. was defendant, numbered on the equity docket as ..... , a decree was rendered against the said A. B. and the said A. B. having obtained an appeal to the ..... , and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said C. D. citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the ..... Circuit, to be holden in the city of ..... , in the State of ..... , on the ..... day of ..... , A. D. 19... next.

S. Eq.—45.

Now, if the said A. B. shall prosecute his appeal to effect and answer all damages and costs (or all costs only if not a supersedeas) if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

A. B.,  
Sureties.

Approved (date).  
Judge, etc.

See *Babitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 361, 101 U. S. 7, 25 L. ed. 820; *Kail v. Wetmore*, 6 Wall. 451, 18 L. ed. 862.

### *To Whom Payable.*

It should be made payable to the appellees, and where the only party to whom it is made payable is not an appellee, the appeal will be dismissed (*Swan v. Hill*, 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 178; *Swift v. Kortrecht*, 49 C. C. A. 68, 110 Fed. 328), but the court will allow names to be inserted (*Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 260 and cases cited; *Davenport v. Fletcher*, 16 How. 142, 14 L. ed. 879; *Hill v. Chicago & E. R. Co.* 129 U. S. 175, 32 L. ed. 653, 9 Sup. Ct. Rep. 269), or defects to be cured.

### *Conditions.*

The bond is not good when the conditions stated in it are not in conformity to the law. *Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed. 728; *Swan v. Hill*, 155 U. S. 394, 39 L. ed. 197, 15 Sup. Ct. Rep. 178. There is no obligation. *Steele v. Crider*, 61 Fed. 484. Thus, "to answer all costs and damages in the event the decree is confirmed," instead of "if it fails to make its plea good" (*Peace River Phosphate Co. v. Edwards*, supra.); but if containing the required conditions, then added conditions are surplusage (*Omaha Hotel Co. v. Kountze*, 107 U. S. 395, 27 L. ed. 616, 2 Sup. Ct. Rep. 911, see rule 13 C. C. A., U. S. Rev. Stat. sec. 1000, U. S. Comp. Stat. 1901, p. 712; *Gay v. Parpart*, 101 U. S. 392, 25 L. ed. 841).

### *By Whom Signed.*

See rule 13 C. C. A., U. S. Rev. Stat. sec. 1000, U. S.

Comp. Stat. 1901, p. 712. It should be signed by the appellant and sureties; however, it is not necessary for all appellants to join in bond, for if approved, it stands as security. *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 319; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 261; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820. Where partners appeal, the individual partners should sign. *The Protector*, 11 Wall. 82, 20 L. ed. 47. Unless it can be amended by the record the appeal will be dismissed. *Moore v. Simonds*, 100 U. S. 145, 25 L. ed. 590; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916; *Estis v. Trabue*, 128 U. S. 229, 32 L. ed. 438, 9 Sup. Ct. Rep. 58.

The sureties must sign, and their sufficiency must be determined by the judge, and he may require as many as he deems necessary. *Jerome v. McCarter*, 21 Wall. 17-33, 22 L. ed. 515-517; *Ex parte French*, 100 U. S. 5, 25 L. ed. 530; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289; *Mexican Nat. Constr. Co. v. Reusens*, 118 U. S. 54, 30 L. ed. 78, 6 Sup. Ct. Rep. 945.

*Approval by the Judge.*

By U. S. Rev. Stat. 1000, the security for appeal is to be taken by the judge who signed the citation and allowed the appeal. This statute has received a liberal construction, and the bond may be approved by any judge or justice who could allow the appeal (*Brown v. Northwestern Mut. L. Ins. Co.* 55 C. C. A. 654; *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643, 119 Fed. 149, 150); but the bond must be approved by a judge or justice who could allow the appeal. This duty cannot be delegated to the clerk or a commissioner. *O'Reilly v. Edrington*, 96 U. S. 726, 24 L. ed. 659; *Haskins v. St. Louis & S. E. R. Co.* 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72; U. S. Comp. Stat. 1901, p. 712, also sec. 1012, Id. p. 716; *Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849; *Warner v. Texas & P. R. Co.* 4 C. C. A. 670, 2 U. S. App. 647, 54 Fed. 920; *First Nat. Bank v. Omaha*, 96 U. S. 738, 24 L. ed. 881; *Anson Co. v. Blue Ridge R. Co.* 23 How. 2, 16 L. ed. 518. The bond may be approved out of Court. *Hudgens v. Kemp*, 18 How. 530, 15 L. ed. 511.

Swearing obligor as to solvency has been held an approval. *Silver v. Ladd*, 6 Wall. 440, 18 L. ed. 828. And an approval has been held to be a sufficient allowance of an appeal. *Peter Ham Brewery Co. v. Security Title & T. Co.* 46 C. C. A. 497, 107 Fed. 618, 619, see *Simpson v. First Nat. Bank*, 63 C. C. A. 371, 129 Fed. 257; *Keyser v. Farr*, 105 U. S. 266, 26 L. ed. 1026. If the judge refuses to approve, the appellate court may be applied to for approval. *Sage v. Central R. Co.* 96 U. S. 715, 24 L. ed. 643; *Hudson v. Parker*, 156 U. S. 284, 39 L. ed. 426, 15 Sup. Ct. Rep. 450, 9 Am. Crim. Rep. 91; *Anson Co. v. Blue Ridge R. Co.* 23 How. 2, 16 L. ed. 518. But an approval obtained by fraud destroys the bond. *Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605.

*Effect of Irregularities in Giving Bond.*

The appeal will not be dismissed for irregularities in giving bond. *Union P. R. Co. v. Callaghan*, 161 U. S. 95, 40 L. ed. 629, 16 Sup. Ct. Rep. 493; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 466; *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 389; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 321. The court will not necessarily dismiss an appeal for want of a bond, but will grant time to furnish one. *Edwards v. United States*, 102 U. S. 576, 26 L. ed. 293; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786; *Seymour v. Freer*, 5 Wall. 822, 18 L. ed. 491; *Davis v. Wakelee*, 156 U. S. 685, 39 L. ed. 583, 15 Sup. Ct. Rep. 555; *The Presto*, 35 C. C. A. 394, 93 Fed. 524; see *Walker v. Houghteling*, 44 C. C. A. 18, 104 Fed. 513; *Davidson v. Lanier*, 4 Wall. 454, 18 L. ed. 379. Nor will waiver of bond affect jurisdiction. *Kingsbury v. Buckner*, 134 U. S. 682, 33 L. ed. 1059, 10 Sup. Ct. Rep. 638. Bond may be given at any time while appeal is alive (*Edmonson v. Bloomshire*, 7 Wall. 312, 19 L. ed. 92; *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; *Brown v. McConnell*, 124 U. S. 492, 31 L. ed. 497, 8 Sup. Ct. Rep. 559); but not after four years (*Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L.

ed. 921, 15 Sup. Ct. Rep. 786). Delay of a month in filing bond not unreasonable. *Schenck v. Diamond Match Co.* 19 C. C. A. 352, 39 U. S. App. 191, 73 Fed. 22. See *Wickelman v. A. B. Dick Co.* 29 C. C. A. 436, 57 U. S. App. 196, 85 Fed. 851; and *Blaffer v. New Orleans Water Supply Co.* 87 C. C. A. 341, 160 Fed. 393, deciding that an appeal may be perfected though the security was not given within six months from the entry of the decree,—and cases cited. Failure to mention term not fatal (*Davis v. Wakelee*, 156 U. S. 685, 39 L. ed. 583, 15 Sup. Ct. Rep. 555), but an appeal from circuit to Supreme Court cannot be sustained without a bond for costs. *Selma & M. R. Co. v. Louisiana Nat. Bank*, 94 U. S. 253, 24 L. ed. 32; *Re Newman*, 79 Fed. 615. A bond given on appeal from a case at law is a nullity. *Jabine v. Oates*, 115 Fed. 864; *Saltmarsh v. Tuthill*, 12 How. 389, 13 L. ed. 1035; *Nelson v. Lowndes County*, 35 C. C. A. 419, 93 Fed. 538.

### *Amendment of Bond.*

The bond may be amended in the appellate court (*Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314; *Morrin v. Lawler*, 91 Fed. 694); or an application to file a new bond may be made (*Clarke v. Eureka County Bank*, 131 Fed. 145; *Morrin v. Lawler*, 91 Fed. 693; *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 463; *Swift v. Kortrecht*, 49 C. C. A. 68, 110 Fed. 328; *Brown v. McConnell*, 124 U. S. 492, 31 L. ed. 497, 8 Sup. Ct. Rep. 559; *Draper v. Davis*, 102 U. S. 370, 26 L. ed. 121).

### *When Becomes Insufficient After Appeal.*

If bond becomes insufficient as a supersedeas, the court may require another to be given, or dismiss appeal on failure to do so. *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *Williams v. Claffin*, 103 U. S. 753, 754, 26 L. ed. 606, 607. See *Johnson v. Waters*, 108 U. S. 4, 27 L. ed. 630, 1 Sup. Ct. Rep. 1.

## CHAPTER CX.

### SUPERSEDEAS BOND.

#### *Power to Grant.*

There is no question of the power of the court to grant a supersedeas in case of an appeal from a final decree and the right is discretionary. *Tornanses v. Melsing*, 45 C. C. A. 615, 106 Fed. 775-787; *Timolat v. Philadelphia Pneumatic Tool Co.* 130 Fed. 903; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 547, 548; *Re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735. See Rule 36 S. C. and Sec. 11 of Act Mch. 3, 1891, U. S. Rev. Stat. Secs. 1000-1007. U. S. Comp. Stat. 1901, pp. 712, 714; equity rule 93, *Leonard v. Ozark Land Co.* 115 U. S. 469, 29 L. ed. 446, 6 Sup. Ct. Rep. 127. This rule as stated above is unquestionably true in appeals from injunctions (*New River Mineral Co. v. Seeley*, 117 Fed. 982; see "Appeal in Injunctions"), but in appeals in other causes a supersedeas is a statutory right. U. S. Comp. Stat. 1901, pp. 712-714, sections 1000, 1007, 1012. *McCourt v. Singer-Bigger*, 76 C. C. A. 73, 145 Fed. 103, 7 A. & E. Ann. Cas. 287 and cases cited. But the amount is discretionary, and a supersedeas may be granted though the bond be very much less than the amount recovered, especially when the decree declares a lien. *Louisville N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 2; *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 151; *Fuller v. Aylesworth*, 21 C. C. A. 505, 43 U. S. App. 657, 75 Fed. 694. But supersedeas is a statutory remedy, and there should be a strict compliance with all required conditions, and when complied with, the bond operates as a supersedeas *per se*, and suspends power of court below. See *Covington Stock Yards Co. v. Keith*, 121 U. S. 250, 30 L. ed. 914, 7 Sup. Ct. Rep. 881; *Sage v. Central R. Co.* 93 U. S. 417, 23 L. ed. 935; *Jabine*

v. Oates, 115 Fed. 864; Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489, 60 Fed. 159, 160. The rule is, then, that, when the judgment is for the recovery of money otherwise unsecured, the security must cover the whole amount of the judgment, but where the property follows the event of the suit, the amount is in the discretion of the court. Jerome v. McCarter, 21 Wall. 31, 22 L. ed. 516; Fuller v. Aylesworth, 21 C. C. A. 505, 43 U. S. App. 657, 75 Fed. 694. To have the effect of a supersedeas, the appeal must be perfected within sixty days, excluding Sundays, after the rendition of the decree, that is, appeal taken, and security filed. Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 656; French v. Shoemaker, 12 Wall. 100, 20 L. ed. 271; Western U. Teleg. Co. v. Eyser, 19 Wall. 428, 22 L. ed. 44 (See Chapt. 119); Washington & A. R. Co. v. Bradley (Washington & A. R. Co. v. Washington) 7 Wall. 577, 19 L. ed. 274. U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714. After that time, in view of Rev. Stat. sec. 1007, which applies to appeals as well as writs of error, the bond will not have the effect of a supersedeas. Ibid.; Union Mut. L. Ins. Co. v. Windett, 36 Fed. 839; Brown v. Evans, 8 Sawy. 502, 18 Fed. 56; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 397; Western Air Line Constr. Co. v. McGillis, 127 U. S. 777, 32 L. ed. 325, 8 Sup. Ct. Rep. 1390. But the appeal having been sued out within sixty days, the bond may be given afterwards with the permission of a justice or judge of appellate court. U. S. Rev. Stat. sec. 1007; Peugh v. Davis, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17. If the appeal is not so taken, a supersedeas cannot be awarded subsequently. New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 398; Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654; Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 935. As to when a writ of error operates as a supersedeas (U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714), see Kitchen v. Randolph, 93 U. S. 92, 23 L. ed. 812; Wurts v. Hoagland, 105 U. S. 703, 26 L. ed. 1110.

### *Effect of Supersedeas Bond.*

In ordinary chancery causes, not involving action as to an

injunction, an appeal, if the supersedeas bond be given in accordance with the statute, operates as a supersedeas. *New River Mineral Co. v. Seeley*, 117 Fed. 982; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; U. S. Rev. Stat. secs. 1000, 1007, 1012.

The supersedeas stays the effect of the decree until affirmance; that is, no action by execution, or otherwise, can be taken under the decree after the bond has been approved. It suspends the power of the court below to take any proceedings under the decree, or if an execution has been issued or other proceedings begun, it prohibits any further steps to be taken. *Stafford v. King*, 32 C. C. A. 536, 61 U. S. App. 487, 90 Fed. 140; *Hovey v. McDonald*, 109 U. S. 157, 27 L. ed. 890, 3 Sup. Ct. Rep. 136; *Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co.* 32 Fed. 530; *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 669.

In *Jerome v. McCarter*, 21 Wall. 28, 22 L. ed. 516, it is said that a bond given as a supersedeas, but not providing for security for costs, would be insufficient as a supersedeas. It covers the amount appealed from, damages for delay, and costs. *American Surety Co. v. North Packing & Provision Co.* 102 C. C. A. 258, 178 Fed. 810.

A supersedeas bond given on appeal from an order issuing an execution at once stops any proceeding under the execution (*Wood v. Brown*, 43 C. C. A. 474, 104 Fed. 207; see *United States ex rel. Harshman v. County Ct.* 39 Fed. 757); or if from the appointment of a receiver, the power of the receiver is suspended and appellant is entitled to a return of the property (*Tornanses v. Melsing*, 45 C. C. A. 615, 106 Fed. 775); or granting a writ of possession (*Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 925). However, the supersedeas bond does not preclude collateral or independent proceedings based on grounds not involving the issues settled by the decree. *Fidelity Truts & S. V. Co. v. Mobile Street R. Co.*, 54 Fed. 26.

### *Liability on Supersedeas Bond.*

By U. S. Rev. Stat. sec. 1000, U. S. Comp. Stat. 1901, p. 712, the bond is required of appellant, conditioned that he shall prosecute his appeal to effect, and if he fail to make his plea



good, he shall answer all damages and costs when the writ is a supersedeas, etc. Supreme Court rules 29; circuit court of appeals rule 13.

This condition covers all compensation for delay arising from the appeal, as well as the amount in the decree appealed from, so far as the latter directs the payment of money. *Wood v. Brown*, 43 C. C. A. 474, 104 Fed. 206, and cases cited; *Egan v. Chicago G. W. R. Co.* 163 Fed. 350, and cases cited; *Jerome v. McCarter*, 21 Wall. 17, 22 L. ed. 515. *Pike v. Gregory*, 55 C. C. A. 78, 118 Fed. 128; *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 911; *Brown v. Northwestern Mut. L. Ins. Co.* 55 C. C. A. 654, 119 Fed. 149; *Woodworth v. Northwestern Mut. L. Ins. Co.* 185 U. S. 354, 46 L. ed. 945, 22 Sup. Ct. Rep. 676; *Rosenstein v. Tarr*, 51 Fed. 370, S. C. 3 C. C. A. 466, 5 U. S. App. 197, 53 Fed. 112; *Crane v. Buckley*, 150 Fed. 402, S. C. 70 C. C. A. 452, 138 Fed. 22; *Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923.

### *Damages Covered By.*

But the damages sought must be the result of the supersedeas. *Ibid.*

To illustrate: Where a supersedeas bond has been given in a suit involving injunctive relief, and damages are sought for violating the injunction, such damages would not arise under, nor be covered by, the supersedeas bond, as the supersedeas did not suspend the effect of the injunction, as has been heretofore stated. In a word, the damage sustained is not the result of the supersedeas. The remedy was by contempt proceedings, or an action for damages independent of the bond. *Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923; *Buckley v. Crane*, 59 C. C. A. 109, 123 Fed. 29.

### *Failure to Prosecute.*

The bond becomes operative when accepted, and any failure to prosecute the appeal to effect, as failing to file the transcript in the appellate court under the statute and rules of the court, is a breach of the condition, and the obligor and sureties become liable. *Smith v. Pendergast*, 82 Fed. 506; *Crane v. Buckley*,

70 C. C. A. 452, 138 Fed. 22. So a judgment of affirmance fixes the liability of the principal and sureties. *Davis v. Patrick*, 6 C. C. A. 632, 12 U. S. App. 629, 57 Fed. 909; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 7, 25 L. ed. 820; *Third Nat. Bank v. Gordon*, 53 Fed. 473, S. C. 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 792; *Egan v. Chicago G. W. R. Co.* 163 Fed. 350.

### *Sureties.*

As to the obligee, sureties are principals, and nothing but reversal discharges sureties on an appeal bond (*Ibid.*; *Babbitt v. Finn* [*Babbitt v. Shields*], 101 U. S. 14, 15, 25 L. ed. 822; *Gordon v. Third Nat. Bank*, 6 C. C. A. 125, 13 U. S. App. 554, 56 Fed. 792-796); nor will they be discharged by requiring new bond for further appeal (*Babbitt v. Finn* [*Babbitt v. Shields*], 101 U. S. 13, 14, 25 L. ed. 821, 822).

### *Motion to Vacate Supersedeas.*

If the supersedeas has been granted without authority, as where the appeal was not perfected in sixty days, or for any other cause, you may file in the appellate court a motion to vacate the supersedeas (*Hudgins v. Kemp*, 18 How. 530, 15 L. ed. 511) in the following form (*Brown v. Evans*, 8 Sawy. 502, 18 Fed. 57).

Title of case as appealed.

And now come the appellees in this cause by....., their counsel, and move the court to vacate the supersedeas in the above cause, or for an order declaring the appeal bond filed by appellant in said cause does not operate as a supersedeas, because the appeal was not sued out within sixty days after the rendering of the judgment entered and complained of in said cause.

R. F.,  
Solicitor, etc.

*Patterson v. Hoa*, 131 U. S. lxxxviii., Appx. and 18 L. ed. 884; *Knox County v. United States*, 131 U. S. clxvi., Appx. and 25 L. ed. 191; *Kitchen v. Randolph*, 93 U. S. 89, 23 L. ed. 811; *Sage v. Central R. Co.* 93 U. S. 416, 23 L. ed. 934.

The action of a judge approving an amount to give the bond

the effect of a supersedeas will not be set aside, except great abuse is apparent (*Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516; *New Orleans Ins. Co. v. E. D. Albro Co.* 112 U. S. 507, 28 L. ed. 809, 5 Sup. Ct. Rep. 289); or, as we have before seen, when approval procured by fraud (*Florida C. R. Co. v. Schutte*, 100 U. S. 646, 25 L. ed. 605).

## CHAPTER CXL

### CITATION IN APPEAL.

A citation is a formal written notice to the adverse party that an appeal has been allowed in the case, and notifying appellee that he must appear in the appellate court at the time designated therein if he desires to be heard. *Villabolas v. United States*, 6 How. 90, 12 L. ed. 356; *Dodge v. Knowles*, 114 U. S. 438, 29 L. ed. 297, 5 Sup. Ct. Rep. 1108, 1197. The citation is signed by the judge or justice authorized to grant the appeal (U. S. Rev. Stat. sec. 999, U. S. Comp. Stat. 1901, p. 712. Rule 8, circuit court of appeals); but failure to sign is cured by the appearance of appellees (*Freeman v. Clay*, 48 Fed. 849).

#### *When Necessary.*

Unless the appeal is taken and perfected in open court, as before explained, or unless waived, a citation is necessary to be issued, and served on the adverse party. *Richardson v. Green*, 130 U. S. 104, 32 L. ed. 872, 9 Sup. Ct. Rep. 443. So when the appeal is taken after the term in which the decree is entered, a citation must be issued or the appeal will be dismissed. *Jacobs v. George*, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 159; *Lockman v. Lang*, 65 C. C. A. 621, 132 Fed. 3; *West v. Erwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

In *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159, the following rules governing the issuance of a citation in appeals are laid down for guidance:

First. No citation is necessary when notice of appeal in open court has been given and the appeal perfected at the term in which the decree was entered, by filing in the appellate court the transcript and docketing the cause in the required time.

McNulta v. West Chicago Park, 39 C. C. A. 545, 99 Fed. 328; Re Fiechtl, 46 C. C. A. 497, 107 Fed. 619 and cases cited; Swift v. Kortrecht, 49 C. C. A. 68, 110 Fed. 328; King v. Thompson, 49 C. C. A. 59, 110 Fed. 319; Central Trust Co. v. Continental Trust Co. 30 C. C. A. 235, 58 U. S. App. 604, 86 Fed. 517; Noonan v. Chester Park Athletic Club Co. 35 C. C. A. 457, 93 Fed. 577.

Second. Though notice is given in open court, a citation is necessary if the appeal is not perfected, as above stated, until after the term in which the decree was entered. Ruby v. Atkinson, 35 C. C. A. 458, 93 Fed. 577; Jacobs v. George, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Haskins v. St. Louis & S. E. R. Co. 109 U. S. 107, 27 L. ed. 873, 3 Sup. Ct. Rep. 72.

Third. A citation, unless waived, is always necessary when the appeal is allowed after the term. Jacobs v. George, 150 U. S. 416, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; Railroad Equipment Co. v. Southern R. Co. 34 C. C. A. 519, 92 Fed. 541; see Gray v. Grand Forks Mercantile Co. 70 C. C. A. 634, 138 Fed. 346; Sage v. Central R. Co. 96 U. S. 715, 24 L. ed. 643.

Fourth. Also when allowed at a subsequent term, though in open court. Jacobs v. George, 150 U. S. 417, 37 L. ed. 1128, 14 Sup. Ct. Rep. 159; Chicago & P. R. Co. v. Blair, 100 U. S. 662, 25 L. ed. 587.

### *May Be Waived.*

The issue of citation is not *fundamentally* jurisdictional, and may be waived. Berliner Gramophone Co. v. Seaman, 47 C. C. A. 630, 108 Fed. 715; Mattingly v. Northwestern Virginia R. Co. 158 U. S. 56, 39 L. ed. 895, 15 Sup. Ct. Rep. 725; Farmers' Loan & T. Co. v. Chicago & N. P. R. Co. 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 317; Richardson v. Green, 130 U. S. 114, 32 L. ed. 875, 9 Sup. Ct. Rep. 443; Andrews v. National Foundry & Pipe Works, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 775; Mendenhall v. Hall, 134 U. S. 567, 33 L. ed. 1015, 10 Sup. Ct. Rep. 616; Railroad Equipment Co. v. Southern R. Co. 34 C. C. A. 519, 92 Fed. 544; Farmers' Loan & T. Co. v. Chicago &

N. P. R. Co. 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 316, 317; Lockman v. Lang, 65 C. C. A. 621, 132 Fed. 4, and cases cited.

A failure to issue and serve a citation, the appeal being allowed and docketed, will not be ground for dismissal until after an opportunity has been given to do so. *Ibid.*

It is not intended to give jurisdiction, but an opportunity to appear. *Ibid.*

It seems that where counsel for appellee indorsed the appeal bond it was held a waiver of citation. *Goodwin v. Fox*, 120 U. S. 775, 30 L. ed. 815, 7 Sup. Ct. Rep. 779. So, joining in a motion to dismiss appeal was a waiver. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 774. So a general appearance in the appellate court waives the citation. *Richardson v. Green*, 130 U. S. 115, 32 L. ed. 875, 9 Sup. Ct. Rep. 443. Or any act acknowledging notice. *Tripp v. Santa Rosa Street R. Co.* 140 U. S. 129, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

When citation is necessary the following form may be used:

United States of America to..... Greeting:

You are hereby notified that in a certain case in equity in the United States Circuit Court in and for the.....District of....., wherein .....is complainant and.....are defendants, and appeal has been allowed the.....therein to the..... You are hereby cited and admonished to be and appear in said court at....., .....days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Hon....., judge of the United States Circuit Court for the.....District of....., this the.....day of....., A. D. 19...

M. S.,  
United States Circuit Judge.

*Shiras Equity Practice*, p. 209; U. S. Rev. Stat. sec. 999.

It may be stated that the rule is settled, that, except in cases of appeal allowed in open court during the term in which the decree is entered, a citation returnable at the same term with the appeal is necessary to perfect jurisdiction, unless waived. *Jacobs v. George*, 150 U. S. 417, 37 L. ed. 1128, 14

Sup. Ct. Rep. 159; *West v. Erwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 420; *Railroad Equipment Co. v. Southern R. Co.* 34 C. C. A. 519, 92 Fed. 544; *Henry v. Alabama & V. R. Co.* 164 U. S. 701, 41 L. ed. 1180, 17 Sup. Ct. Rep. 994; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; *Pender v. Brown*, 56 C. C. A. 646, 120 Fed. 497.

*When May Be Issued and When Returnable.*

Whether the appeal be to the Supreme Court or circuit court of appeals, the citation must be made returnable not exceeding thirty days from date of signing, and whether the return day fall in term time or vacation, and must be served before the return day. Supreme Court rule 8, sec. 5, and rule 9, sec. 1; 137 U. S. 710; see *Washington v. Dennison*, 6 Wall. 496, 18 L. ed. 863; *Seagrist v. Crabtree*, 127 U. S. 774, 32 L. ed. 324, 8 Sup. Ct. Rep. 1394; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 152; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165. (See "How Served.")

It may be issued properly returnable even after expiration of time for taking appeal, if allowance of appeal made in time. *Altenberg v. Grant*, rule 8, par. 5, S. C. 137 U. S. 710, 28 C. C. A. 224, 54 U. S. App. 312, 83 Fed. 981 and cases cited; *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Seagrist v. Crabtree*, 127 U. S. 773, 32 L. ed. 323, 8 Sup. Ct. Rep. 1394; *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; circuit court of appeals rule 14, sec. 5. However, there is some variance in this rule fixing the return day in the different circuits, as well as in the language, to which your attention is called in order to examine the rules of your circuit.

In appeals from interlocutory orders granting or continuing an injunction in the fifth circuit, the citation is returnable ten days from its date. In other cases appeals and citations are made returnable not exceeding thirty days from the day of signing the citation whether it fall in term time or vacation, and must be served before the return day, rule 14, par. 5, 5th circuit. In the eighth circuit the citation is returnable in sixty

days from the day of signing the citation. I believe, however, the different circuits generally follow the 8th S. C. rule, par. 5.

### *How Served.*

If the service is not accepted it may be served by any citizen, who must make affidavit that he delivered a copy of the citation to the appellee as follows:

State of.....

County of.....

On this the.....day of....., A. D. 19..., personally appeared before the undersigned authority Richard Roe, who, being sworn, says that he delivered a copy of the within citation to C. D. or (R. F., Solicitor of C. D.).

Sworn to before me this the.....day of....., A. D. 19...

L. R.,

[SEAL.]

Notary Public.

See *Mutual L. Ins. Co. v. Phinney*, 178 U. S. 334, 44 L. ed. 1092, 20 Sup. Ct. Rep. 906.

Service may be made on the attorney of the appellee, and such service is good for all parties represented by him. *Davis v. Wakelee*, 156 U. S. 684, 39 L. ed. 582, 15 Sup. Ct. Rep. 555; *Bigler v. Waller*, 12 Wall. 147, 20 L. ed. 261. And an attorney cannot withdraw so as to prevent service. *Dayton v. Lash*, 94 U. S. 112, 24 L. ed. 33; *Rio Grande Irrig. & Colonization Co. v. Gildersleeve*, 174 U. S. 606, 43 L. ed. 1104, 19 Sup. Ct. Rep. 761. So, acceptance on the citation by the attorney of record is sufficient. *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 77 Fed. 774. You cannot send it through the postoffice (*Tripp v. Santa Rosa Street R. Co.* 144 U. S. 129, 36 L. ed. 372, 12 Sup. Ct. Rep. 655); but may leave copy at house. (*Ibid.*) It must be served to give jurisdiction. *Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed. 728; *Jacobs v. George*, 150 U. S. 415, 37 L. ed. 1127, 14 Sup. Ct. Rep. 159; *Hewitt v. Filbert*, 116 U. S. 143, 29 L. ed. 582, 6 Sup. Ct. Rep. 319; *Davidson v. Lanier*, 4 Wall. 447, 18 L. ed. 377; *Babbitt v. Finn* (*Babbitt v. Shields*) 101 U. S. 11, 25 L. ed. 821. However, where parties are numerous, notice to a few of each class who should appear in good faith in defense of the interests of that class would be sufficient. *Kidder v. Fidelity Ins. Trust*



& S. D. Co. 44 C. C. A. 593, 105 Fed. 825 and cases cited. As to service of writs of error, U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714; see *McCarley v. McGee*, 108 Fed. 497. Service may be perfected by personal service, as in the service of ordinary process. *Ibid.*

*Alias Citation.*

The court of appeals may order an alias citation to bring in parties not served under the original (*Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980), if appeal docketed in time. *Railroad Equipment Co. v. Southern R. Co.* 34 C. C. A. 519, 92 Fed. 544; *Shute v. Keyser*, 149 U. S. 650, 37 L. ed. 884, 13 Sup. Ct. Rep. 960. But if not issued and served before end of next ensuing term, appeal becomes inoperative if not waived. *Jacobs v. George*, 150 U. S. 416, 417, 37 L. ed. 1127, 1128, 14 Sup. Ct. Rep. 159, and authorities; see *McClellan v. Pyeatt*, 1 C. C. A. 241, 4 U. S. App. 48, 49 Fed. 259; *Bloomington v. Watson*, 62 C. C. A. 600, 128 Fed. 269.

S. Eq.—46.

## CHAPTER CXII.

### WHO MAY APPEAL.

It may be stated, as a general rule, that all parties having an interest in the cause, and affected by the decree should join in the appeal. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 821; *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627 and cases cited. *Simpson v. Greeley*, 20 Wall. 158, 22 L. ed. 339; *Sipperley v. Smith*, 155 U. S. 86, 39 L. ed. 79, 15 Sup. Ct. Rep. 15; *Davis v. Mercantile Trust Co.* 152 U. S. 593, 38 L. ed. 564, 14 Sup. Ct. Rep. 693; *Wilson v. Kiesel*, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; *St. Louis United Elevator Co. v. Nichols*, 34 C. C. A. 90, 91 Fed. 833; *Dodson v. Fletcher*, 24 C. C. A. 69, 49 U. S. App. 61, 78 Fed. 214; *Hedges v. Seibert Cylinder Oil Cup Co.* 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643; *Aiken v. Smith*, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; *Humes v. Third Nat. Bank*, 4 C. C. A. 668, 13 U. S. App. 86, 54 Fed. 917; *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41; *Hardee v. Wilson*, 146 U. S. 180, 36 L. ed. 933, 13 Sup. Ct. Rep. 39; *Fordyce v. Trigg*, 175 U. S. 723, 44 L. ed. 337, 20 Sup. Ct. Rep. 1024. (See "Who Made Parties to Appeal"); but parties not affected by the decree need not join (*Gilfillan v. McKee*, 159 U. S. 312, 40 L. ed. 163, 16 Sup. Ct. Rep. 6; *Louisville, N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 5; *Farmers' Loan & T. Co. v. Waterman*, 106 U. S. 269, 270, 27 L. ed. 116, 117, 1 Sup. Ct. Rep. 131; *Basket v. Hassell*, 107 U. S. 608, 27 L. ed. 501, 2 Sup. Ct. Rep. 415; *Postal Teleg. Cable Co. v. Vane*, 26 C. C. A. 342, 53 U. S. App. 319, 80 Fed. 961); as in cases where the decree is several, and interest separate (*Ibid.*; *Hall v. Gambrill*, 34 C. C. A. 190, 63 U. S. App. 740, 92 Fed. 32; *Grand Island & W. C. R. Co. v. Sweeney*, 43 C. C. A. 255, 103 Fed. 342; *Hanrick v. Patrick*, 119 U. S. 164, 30 L. ed. 402, 7 Sup. Ct. Rep. 147).

That parties having an interest in the decree must join in the appeal has been held to be jurisdictional, unless there has been a summons and severance. *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41-49; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 821; *Ayres v. Polsdorfer*, 45 C. C. A. 24, 105 Fed. 737; *Dolan v. Jennings*, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584; *Estis v. Trabue*, 128 U. S. 230, 32 L. ed. 438, 9 Sup. Ct. Rep. 58; *Hanrick v. Patrick*, 119 U. S. 163, 30 L. ed. 402, 7 Sup. Ct. Rep. 147; *The Columbia*, 15 C. C. A. 91, 29 U. S. App. 647, 67 Fed. 944; *Fitzpatrick v. Graham*, 56 C. C. A. 95, 119 Fed. 353; *Hedges v. Seibert Cylinder Oil Cup Co.* 1 C. C. A. 594, 3 U. S. App. 25, 50 Fed. 643.

### *Summons and Severance in Appeal.*

If the parties interested refused to join, then you should apply to the judge for a severance, which is done by first serving the parties with notice that you intend to appeal and request them to join; if they refuse, then file a motion in court stating the facts and the refusal, and a copy of the notice served, and pray for a severance. The motion with the order of severance must be made a part of the record to give jurisdiction. *Faulkner v. Hutchins*, 61 C. C. A. 425, 126 Fed. 363; *Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 217; *Provident Life & Trust Co. v. Camden & T. R. Co.* 101 C. C. A. 68, 177 Fed. 854; *Detroit v. Guaranty Trust Co.* 93 C. C. A. 604, 168 Fed. 610; *Inglehart v. Stansbury*, 151 U. S. 68, 38 L. ed. 76, 14 Sup. Ct. Rep. 237; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 123, 39 L. ed. 919, 15 Sup. Ct. Rep. 786; *Winters v. United States*, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207; *Farmers' Loan & T. Co. v. McClure*, 24 C. C. A. 66, 49 U. S. App. 46, 78 Fed. 211; *Re Key*, 189 U. S. 84, 47 L. ed. 720, 23 Sup. Ct. Rep. 624.

A separate appeal by one of several joint defendants is not maintainable until after notice, and refusal. *Ibid.*; *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174; *Beardsley v. Arkansas & L. R. Co.* 158 U. S. 127, 39 L. ed. 921, 15 Sup. Ct. Rep. 786. The excuse for nonjoinder must appear in the record. *Inglehart v. Stansbury*, 151 U. S. 72, 38 L. ed. 77, 14

Sup. Ct. Rep. 237. And where one of two or more defendants does not join in the appeal, and he has not been served with summons and notice of severance he cannot be made a party by amendment after the time for appeal has expired (*Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 217; *Consumers' Cotton Oil Co. v. Nichol*, 57 C. C. A. 321, 120 Fed. 818); and objection may be made at any time (*Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 626; *Ayres v. Polsdorfer*, 45 C. C. A. 24, 105 Fed. 737); but it seems that upon appeal taken by one of several defendants in a joint decree, in open court, and allowed by the court at the time the decree is entered, when all parties are presumed to be present, that such allowance will be equivalent to "summons and severance." *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *McNulta v. West Chicago Park*, 39 C. C. A. 545, 99 Fed. 328; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 824; *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174; *King v. Thompson*, 49 C. C. A. 59, 110 Fed. 319; *Detroit v. Guaranty Co.* 93 C. C. A. 604, 168 Fed. 611.

*Appeals by Parties Not Parties to the Original Proceedings Below.*

The general rule is that one who is not a party or privy to a decree cannot appeal therefrom. *Guion v. Liverpool & L. & G. Ins. Co.* 109 U. S. 173, 27 L. ed. 895, 3 Sup. Ct. Rep. 108; *Aiken v. Smith*, 4 C. C. A. 652, 2 U. S. App. 445, 54 Fed. 895; *Ex parte Cutting*, 94 U. S. 19, 20, 24 L. ed. 50; *Ex parte Cockcroft*, 104 U. S. 578, 26 L. ed. 856; *Cook v. Lasher*, 19 C. C. A. 654, 42 U. S. App. 42, 73 Fed. 704; *Elwell v. Fosdick*, 134 U. S. 513, 33 L. ed. 1002, 10 Sup. Ct. Rep. 598; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 916, and cases cited. But sometimes the interests of parties not made parties to the original proceedings are affected by the decree to such an extent that the courts have recognized their right to have the decree revised.

Thus a purchaser of property under a decree becomes a party to all subsequent proceedings had after the sale, and he may appeal from the action of the trial court affecting his rights. *Kneeland v. American Loan & T. Co.* 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950; *Davis v. Mercantile Trust Co.*

152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 504, 34 L. ed. 1024, 11 Sup. Ct. Rep. 405; *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166; *Williams v. Morgan*, 111 U. S. 697, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; see *Sage v. Central R. Co.* 93 U. S. 419, 23 L. ed. 935. However, see *Swann v. Wright* (*Swann v. Fabyan*) 110 U. S. 601, 28 L. ed. 256, 4 Sup. Ct. Rep. 235, where a purchaser at foreclosure could not attack prior liens. *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 222, 34 L. ed. 103, 10 Sup. Ct. Rep. 736; *Central Trust Co. v. Georgia P. R. Co.* 30 C. C. A. 648, 58 U. S. App. 120, 87 Fed. 293. So where a sale is subject to conditions, a purchaser cannot be heard upon them. *Kneeland v. American Loan & T. Co.* 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950. Nor can he dispute the correctness of the decree. *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 305; *Baltimore Trust & Guarantee Co. v. Hofstetter*, 29 C. C. A. 35, 56 U. S. App. 122, 85 Fed. 78; see also *Stuart v. Gay*, 127 U. S. 530, 32 L. ed. 195, 8 Sup. Ct. Rep. 1279.

An appeal by one not a party to the original proceedings must be perfected by a sworn petition, setting up the interest and how affected by the decree, and praying to be permitted to intervene in order to appeal. See *Aiken v. Smith*, 4 C. C. A. 654, 2 U. S. App. 618, 54 Fed. 896; *Sage v. Central R. Co.* 93 U. S. 418, 419, 23 L. ed. 935, 936.

### *Parties Dying After Decree.*

(Act 1875, sec. 9, 18 Stat. at L. 473, chap. 137, U. S. Comp. Stat. 1901, p. 513.)

When a party dies after judgment and before the time for an appeal elapses, his personal representatives may enter an appeal, etc. *Conaway v. Third Nat. Bank*, 92 C. C. A. 488, 167 Fed. 26; *Dolan v. Jennings*, 139 U. S. 387, 35 L. ed. 217, 11 Sup. Ct. Rep. 584. (See "Effect of Death on Appeal") chap. 115.

### *Party Not Appealing.*

If a party does not appeal, the decree cannot be reversed.

though error has been committed affecting his rights (*Southern P. R. Co. v. United States*, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4; *Mt. Pleasant v. Beckwith*, 100 U. S. 527, 25 L. ed. 702; *United States v. Blackfeather*, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64; *Cherokee Nation v. Blackfeather* [*United States v. Blackfeather*] 155 U. S. 218, 39 L. ed. 126, 15 Sup. Ct. Rep. 63; *The Stephen Morgan* [*The Stephen Morgan v. Good*] 94 U. S. 599, 24 L. ed. 266; *Bensiek v. Thomas*, 13 C. C. A. 451, 27 U. S. App. 765, 66 Fed. 106), though he has assigned error (*United States v. Blackfeather*, *supra*; *Muskogee Nat. Teleph. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382; *O'Neil v. Wolcott Min. Co.* 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 528).

*An Appeal From a Fictitious Case.*

There can be no appeal if there is no actual controversy (*Little v. Bowers*, 134 U. S. 558, 33 L. ed. 1020, 10 Sup. Ct. Rep. 620; *California v. San Pablo & T. R. Co.* 149 U. S. 314, 37 L. ed. 748, 13 Sup. Ct. Rep. 876; *East Tennessee, V. & G. R. Co. v. Southern Teleg. Co.* 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391; *Lord v. Veazie*, 8 How. 255, 12 L. ed. 1069); nor after compromise (*Dakota County v. Glidden*, 113 U. S. 226, 28 L. ed. 982, 5 Sup. Ct. Rep. 428); nor if collusive (*Benner v. Hayes*, 26 C. C. A. 271, 53 U. S. App. 376, 80 Fed. 953; *Weaver v. Kelly*, 34 C. C. A. 423, 92 Fed. 421; *Arnold v. Woolsey*, 4 C. C. A. 319, 12 U. S. App. 157, 54 Fed. 269); nor where possibility of relief ceases pending suit (*Mills v. Green*, 159 U. S. 654, 40 L. ed. 294, 16 Sup. Ct. Rep. 132).

*As to Appeals by Interveners.*

Will not lie on refusal to allow intervention, because intervention is within the discretion of the court. *Re Columbia Real Estate Co.* 50 C. C. A. 406, 112 Fed. 645, and cases cited. *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 665; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 219; *Creditors Commutation Co. v. United States*,

34 C. C. A. 12, 62 U. S. App. 728, 91 Fed. 573; S. C. 177 U. S. 311, 44 L. ed. 782, 20 Sup. Ct. Rep. 636; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Buel v. Farmers' Loan & T. Co.* 44 C. C. A. 213, 104 Fed. 839. However, in certain applications for intervention, where a party would be denied all relief by refusing the intervention, such leave to intervene is not discretionary, and may be appealed from (see chapter 80). *Minot v. Mastin*, 37 C. C. A. 234, 95 Fed. 739; *Credits Comutation Co. v. United States*, 177 U. S. 315, 316, 44 L. ed. 785, 786, 20 Sup. Ct. Rep. 636. But having intervened, may appeal as when, after intervention allowed, they have been dismissed. *Hamlin v. Toledo, St. L. & K. C. R. Co.* 36 L.R.A. 826, 24 C. C. A. 271, 47 U. S. App. 422, 78 Fed. 672; *Kneeland v. American Loan & T. Co.* 136 U. S. 94, 34 L. ed. 382, 10 Sup. Ct. Rep. 950; *Williams v. Morgan*, 111 U. S. 696, 699, 28 L. ed. 564, 4 Sup. Ct. Rep. 638; *Rice v. Durham Water Co.* 91 Fed. 434; *Re Michigan C. R. Co.* 59 C. C. A. 643, 124 Fed. 727-730 and cases cited. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 823. And when appeal taken where intervener did not join, the appellate court will not consider refusal of court to grant the relief prayed for by intervener. *Muskogee Nat. Teleph. Co. v. Hall*, 55 C. C. A. 208, 118 Fed. 382.

### *As to Appeals By and Against Receivers.*

A receiver in foreclosure suit may appeal, though not a party (*Hinckley v. Gilman, C. & S. R. Co.* 94 U. S. 469, 24 L. ed. 166; *Hovey v. McDonald*, 109 U. S. 155, 27 L. ed. 889, 3 Sup. Ct. Rep. 136); but not when his intervention has been refused without prejudice. As to appeals by receivers, see *Bosworth v. St. Louis Terminal R. Asso.* 174 U. S. 182-186, 43 L. ed. 941-943, 19 Sup. Ct. Rep. 625. He cannot question orders of the court, or conditions of his appointment, unless they affect his personal rights. *Hunt v. Illinois C. R. Co.* 37 C. C. A. 548, 96 Fed. 647, 648; *Chapman v. Atlantic Trust Co.* 56 C. C. A. 61, 119 Fed. 266; *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 824; see *Kirkpatrick v. Eastern Mill. & Export Co.* 135 Fed. 151; *Edgell v. Felder*, 39 C. C. A. 540, 99 Fed. 324; *Illinois Trust & Sav.*

Bank v. Kilbourne, 22 C. C. A. 599, 44 U. S. App. 663, 76 Fed. 883.

### *Appeal by Partners.*

You cannot appeal in firm name, but must state the individual members of the firm (*Estis v. Trabue*, 128 U. S. 225, 32 L. ed. 437, 9 Sup. Ct. Rep. 58), and each must sign bond (*The Protector*, 11 Wall. 82, 20 L. ed. 47; *Re Woerishoffer*, 21 C. C. A. 175, 41 U. S. App. 411, 74 Fed. 915); and both as to appellants and appellee, individual names must be given; no collective designation is permitted. This does not apply to corporations. *Ibid.*

### *Cross Appeals.*

An appellee may file a cross appeal at the same time with appellants appeal, or he may file it at any time within the time limit, but the same rules regarding assignments of error and procedure in appeals must be pursued, without reference to appellant's appeal. *Hilton v. Dickinson*, 108 U. S. 168, 27 L. ed. 689, 2 Sup. Ct. Rep. 424; *Building & L. Asso. v. Logan*, 14 C. C. A. 133, 30 U. S. App. 163, 66 Fed. 827; *Morrison v. Kuhn*, 26 C. C. A. 130, 52 U. S. App. 178, 80 Fed. 741; *Green v. Lynn*, 31 C. C. A. 248, 50 U. S. App. 380, 87 Fed. 840. It cannot be done by assigning cross errors (*O'Neil v. Wolcott Min. Co.* 27 L.R.A.(N.S.) 200, 98 C. C. A. 309, 174 Fed. 528; *Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co.* 83 C. C. A. 431, 154 Fed. 567; *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 172; *Shawnee County v. Hurley*, 94 C. C. A. 362, 169 Fed. 94), except that the transcript filed by one party may be used by both. U. S. Rev. Stat. sec. 1013, U. S. Comp. Stat. 1901, p. 716; circuit court of appeals rules 25; Supreme Court rules 22.

### *Who Made Parties to Appeal.*

All parties to the record interested in the decision are entitled to be heard on appeal has already been stated when dis-



cussing "*Who may Appeal*" above. For further authorities, see *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 823, and cases cited. *Grand Island & W. C. R. Co. v. Sweeney*, 37 C. C. A. 127, 95 Fed. 396, S. C. 43 C. C. A. 255, 103 Fed. 342. *Railroad Equipment Co. v. Southern R. Co.* 34 C. C. A. 519, 92 Fed. 541; *Bloomington v. Watson*, 62 C. C. A. 600, 128 Fed. 269; *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174; *Detroit v. Guaranty Trust Co.* 93 C. C. A. 604, 168 Fed. 611; *Farmers' Loan & T. Co. v. Longworth*, 22 C. C. A. 420, 48 U. S. App. 71, 76 Fed. 610. And this is true though parties have defaulted. *American Loan & T. Co. v. Clark*, 27 C. C. A. 522, 49 U. S. App. 571, 83 Fed. 230.

An insolvent corporation is a necessary party to an appeal from a decree ordering a receiver to pay certain judgments. *Farmers' Loan & T. Co. v. Longworth*, *supra*. Subcontractors are necessary parties to an appeal from a decree holding them liable with the contractors. *Grand Island & W. C. R. Co. v. Sweeney*, 37 C. C. A. 127, 95 Fed. 398. So purchasers at sale under a mortgage, and the mortgagor, should be made parties to an appeal from the confirmation of the sale. *Davis v. Mercantile Trust Co.* 152 U. S. 594, 38 L. ed. 565, 14 Sup. Ct. Rep. 693; *Kneeland v. American Loan & T. Co.* 136 U. S. 89, 34 L. ed. 379, 10 Sup. Ct. Rep. 950. So in an appeal from decree of foreclosure. *Davis v. Mercantile Trust Co.* 152 U. S. 594, 595, 38 L. ed. 565, 14 Sup. Ct. Rep. 693. The appeal will be dismissed where the record shows the absence of a party vitally interested. *Hook v. Mercantile Trust Co.* 36 C. C. A. 645, 95 Fed. 41; *Wilson v. Kiesel*, 164 U. S. 252, 41 L. ed. 423, 17 Sup. Ct. Rep. 124; *Hardee v. Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 34; *Loveless v. Ransom*, 46 C. C. A. 515, 107 Fed. 627; *Faulkner v. Hutchins*, 61 C. C. A. 425, 126 Fed. 363. Except as before stated, where parties are very numerous, service of citation upon several of a class who appear in good faith in defense of the class interests will be sufficient. *Kidder v. Fidelity Ins. Trust & S. D. Co.* 44 C. C. A. 593, 105 Fed. 825; citing *Franklin Sav. Bank v. Taylor*, 4 C. C. A. 55, 9 U. S. App. 406, 53 Fed. 867. See *Re Jemison Mercantile Co.* 50 C. C. A. 641, 112 Fed. 969. As to creditors appealing in Bankrupt matters see also *Re A. L. Robertshaw Mfg. Co.* 135 Fed. 221, 222.

## CHAPTER CXIII.

### TRANSCRIPT.

The rules of both the Supreme Court and circuit court of appeals require, as we have seen, the return of the citation for appeal not exceeding thirty days from the signing by the judge, and whether in term time or vacation. Circuit court of appeals rule 14, sec. 5; *Id.*, rule 16; Supreme Court rule 8, sec. 5; U. S. Rev. Stat. sec. 999, U. S. Comp. Stat. 1901, p. 712. *Edmonson v. Bloomshire*, 7 Wall. 309, 310, 19 L. ed. 91, 92; *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 165.

You have, then, the duty upon you of prosecuting vigorously the appeal, as you have only thirty days within which to file the transcript in the appellate court (circuit court of appeals rule 16), unless for good cause shown the justice or judge who signed the citation, or any judge of the circuit court of appeals, extends the time *by* or *before* its expiration. *West v. Irwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

If the order of enlargement is given, you must file it with the clerk of the circuit court of appeals. The appellant should then at once direct the clerk to make out the transcript and forward to the clerk of the appellate court. *Chamberlain Transp. Co. v. South Pier Coal Co.* 61 C. C. A. 109, 126 Fed. 167; *Re Alden-Electric Co.* 59 C. C. A. 509, 123 Fed. 415.

The six months given within which to file the appeal does not affect this rule. You have that time to consider whether you will appeal or not, but, having sued out your appeal, then you have only thirty days to file the transcript in the court of appeals, unless extended as stated.

If the transcript is not filed under the rule, the appellee may have the case docketed and dismissed on certificate that an appeal had been sued out and not prosecuted. Rule 9, S. C.; circuit court of appeals, rule 16. See *Love v. Busch*, 73 C. C.

A. 545, 142 Fed. 431; *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493; *Hill v. Chicago & E. R. Co.* 129 U. S. 174, 32 L. ed. 653, 9 Sup. Ct. Rep. 269; *Hill v. Chicago & E. R. Co.* 140 U. S. 53, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; *Richardson v. Green*, 130 U. S. 111, 32 L. ed. 874, 9 Sup. Ct. Rep. 443; *Small v. Northern P. R. Co.* 134 U. S. 515, 33 L. ed. 1007, 10 Sup. Ct. Rep. 614; *Stevens v. Clark*, 10 C. C. A. 379, 18 U. S. App. 584, 62 Fed. 324; *Pender v. Brown*, 56 C. C. A. 647, 120 Fed. 497. The filing of the record is a jurisdictional necessity. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 242. It seems, however, that the failure to docket in time will not be noticed if no motion to have it dismissed on certificate is made (*West Chicago Street R. Co. v. Ellsworth*, 23 C. C. A. 393, 46 U. S. App. 603, 77 Fed. 664, and authorities), before it is docketed. *Ouings v. Tiernan*, 10 Pet. 24, 9 L. ed. 333; *Chicago Dollar Directory Co. v. Chicago Directory Co.* 13 C. C. A. 8, 24 U. S. App. 525, 65 Fed. 463; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 149. See *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314, for excuse for failure to file in time. As to return of transcript in writ of error, see *Gilman v. Fernald*, 72 C. C. A. 666, 141 Fed. 940 and cases cited.

### *What Transcript to Contain.*

By U. S. Rev. Stat. sec. 698, U. S. Comp. Stat. 1901, p. 568. See, also, *Ibid.* sec. 750, U. S. Comp. Stat. 1901, p. 591, it is provided that the transcript in an appeal in equity should contain the record as directed by law to be made, and copies of the proofs and of such entries and papers on file as *may be necessary* on the hearing of the appeal; that they shall be transmitted to the Supreme Court, and the court below or the appellate court can order any original document to be sent up in lieu of the copy.

The transcript must contain a copy of the pleadings, all papers, exhibits, depositions, or testimony, however taken, and any matter of record necessary to present the controversy fully, with the orders and decrees appealed from. Then the papers perfecting the appeal, with the assignment of errors.

U. S. Rev. Stat. sec. 997, provides that there shall be annexed to and returned with any writ of error and authenticated transcript of the record an assignment of errors and prayer for reversal, with the citation to the adverse party.

By Supreme Court rule 8 the clerk of the court below is required to transmit a true copy of the record and assignment of errors (rule 11, circuit court of appeals) and all proceedings in the case under his hand and the seal of the court (Supreme Court rule 8, sec. 1). Also a copy of the opinion of the court below, if one has been rendered. Supreme Court rule 8, sec. 2; *Loeb v. Columbia Twp.* 179 U. S. 483, 45 L. ed. 287, 21 Sup. Ct. Rep. 174; *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120. See *Townsend v. Beatrice Cemetery Asso.* 70 C. C. A. 521, 138 Fed. 381; *Pacific Sheet Metal Works v. Californian Canneries Co.* 91 C. C. A. 108, 164 Fed. 984; as to force of opinion. It also provides that no case will be heard unless a complete record, containing in itself, and *not by reference*, all the papers, exhibits, depositions, and other proceedings *necessary to a hearing*, and that original papers may be ordered up with the record. Supreme Court rule 8, sec. 3 and 4; circuit court of appeals rule 14; *Dowagiac Mfg. Co. v. Brennan*, 156 Fed. 213. The transcript, of course, includes the pleadings that is, the bill, process, return showing jurisdiction, then answer and replication showing issues, then the evidence by both parties. Next, opinion of the court and its decree. Then should follow the appellate proceedings containing petition for appeal, assignment of errors, order allowing appeal, and bond, citation in appeal and service if not given in open court; and finally the clerks certificate, sec. 698, U. S. Comp. Stat. 1901, p. 568. *McIlwaine v. Ellington*, 99 Fed. 133; *Hunt v. Kile*, 38 C. C. A. 641, 98 Fed. 49; *Redfield v. Parks*, 130 U. S. 624, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 326, 327; *Merri-man v. Chicago, D. & V. R. Co.* 56 C. C. A. 536, 120 Fed. 240; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 41, 42.

The record in an equity suit usually means the proceedings from filing the bill to the final decree, and the procedure in getting the cause to the appellate court.

The statutes and rules are sufficiently explanatory except

in the use of the words, "as necessary for a hearing." It is clear from these words that a transcript need not always contain all the proceedings, entries and papers, etc.; but the question arises, Who is to determine what is necessary or what is to be omitted? To determine this there may be, first, a joint stipulation of counsel—that is, counsel can agree in order to simplify the record as to what shall be put in the record (*Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245), second, it is evidently the duty of counsel who takes an appeal to see that the case is properly and fairly presented in the transcript, and the clerk may require a written designation of papers (*Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168), and because of this fact the clerk should be guided by his selections of matter for the transcript. *Union P. R. Co. v. Stewart*, 95 U. S. 279, 24 L. ed. 431; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 41, 42, and cases cited.

If the clerk is requested by one party to leave out anything which the other requests to be inserted, an application to the court and direction by him is the proper practice. *Hoe v. Kahler*, 27 Fed. 145; *Union P. R. Co. v. Stewart*, 95 U. S. 279, 24 L. ed. 431. The Clerk should have no discretion in the matter, though intimated otherwise in *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1, as he is not learned in the law, or sufficiently familiar with the issues or the evidence to determine the matter. This is clearly intimated in *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131, and approved in *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 244. If the court cannot be reached to determine the question, it is the clerk's duty to insert the whole matter. *Ibid.* *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120, and cases cited. See *Re A. L. Robertshaw Mfg. Co.* 135 Fed. 222. Thus the clerk cannot, at the request of one party, insert so much of a deposition as is favorable to one side, but must, on the demand of counsel on the other side, insert such parts of the deposition as he deems necessary; and so

with reference to papers. See *Gregory v. Pike*, 12 C. C. A. 202, 21 U. S. App. 474, 64 Fed. 417; *Florida C. R. Co. v. Schutte*, 100 U. S. 648, 25 L. ed. 606; *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932.

When the clerk has done his duty and inserted the whole matter upon which parties have disagreed, the appellate court may control it in apportioning costs, if the disputed matter was not necessary to the hearing.

If the clerk should undertake to exercise any discretion in the matter, which they do sometimes, and exclude matter which you have requested to be inserted in the record, then you can reach it by suggesting in the appellate court a diminution of the record, as hereinafter explained. *Ibid.* But irrelevant matter should not be placed in the record. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168.

If the matters in dispute are numerous, then the clerk should send up the whole record. In *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131, it is said, that it is well to impress upon clerks of the trial courts that in the absence of a controlling stipulation by counsel, or written instructions from the appellant's counsel filed in the case, then the requirements of rule 14, circuit court of appeals, should be followed.

Not only the depositions and other written evidence, but all evidence taken orally, should be reduced to writing and incorporated in the transcript (*Blease v. Garlington*, 92 U. S. 7, 23 L. ed. 523; *Adee v. J. L. Mott Iron Works*, 46 Fed. 39, Supreme Court rule 35; circuit court of appeals rule 14); and translations of all evidence taken in a foreign tongue shall be incorporated. Circuit court of appeals rule 15.

The nature of any portion of the record omitted should be indicated in the transcript, even under a stipulation. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245.

The transcript for a cross appeal is governed by the same rules. U. S. Rev. Stat. sec. 1013, U. S. Comp. Stat. 1901, p. 716; *Gregory v. Pike*, 12 C. C. A. 202, 21 U. S. App. 474, 64 Fed. 415; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771.

If counsel wishes to stipulate what the transcript should contain, it may be drawn as follows:

A. B. Appellant, }  
                   vs.        }  
 C. D., Appellee }]

United States Circuit Court of Ap-  
 peals for the.....Circuit.

Appeal from the United States Cir-  
 cuit Court for the.....District of  
 .....

It is hereby stipulated by counsel for both parties in the above cause that the clerk in making up the transcript may omit therefrom the following papers and records (here set forth what is to be omitted), and that an order may be entered accordingly with the permission of the court.

R. F.,

Counsel for A. B., Appellant.

E. F.,

Counsel for C. D., Appellee.

Date.....

### *Certificate to the Transcript.*

Section 997, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 712, requires an authenticated transcript of the record, and rule 8 of the Supreme Court rules, and rule 14 (79 C. C. A. xxviii, 90 Fed. cxxv), of the circuit court of Appeals, require a true copy of the record, assignment of errors, and all proceedings in the case under the hand of the clerk and seal of the court to be transmitted to the appellate court. *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 120. U. S. Rev. Stat. sec. 698, U. S. Comp. Stat. 1901, p. 568. Rev. Stat. sec. 750, U. S. Comp. Stat. 1901, p. 591.

The certificate must show that the transcript is complete, and not simply that the matters contained in the transcript are correct copies (*Ruby v. Atkinson*, 35 C. C. A. 458, 93 Fed. 577; *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874, 875; *Jacksonville, T. & K. W. R. Co. v. American Constr. Co.* 6 C. C. A. 249, 13 U. S. App. 377, 57 Fed. 66; *Farmers' Loan & T. Co. v. Eaton*, 51 C. C. A. 640, 114 Fed. 18; See "*Form of Certificate*"), or it must show that the record as sent up was designated by the stipulations of counsel, or that the clerk was guided by appel-

lant's counsel in preparing the transcript, and selecting the papers necessary to a hearing (*Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168; *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; *Farmers' Loan & T. Co. v. Eaton*, 51 C. C. A. 640, 114 Fed. 18).

In *Pennsylvania Co. v. Jacksonville T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131, "that the foregoing is a true, full and complete transcript of all the papers, orders and decrees from the files and records of my office in the above-entitled cause," was sufficient.

In *Cutting v. Tavares, O. & A. R. Co.* 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 150, a certificate, "that the foregoing papers, numbered from 1 to 200, inclusive, is a true, full, and complete transcript of so much of the said records, papers, exhibits and proceedings in the said cause of.....as now appears and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files and orders therein contained as they are now of file and of record in my office,"—was held insufficient.

### *Form of Certificate.*

I, W. R., clerk of the Circuit Court of the United States for the..... District of....., in the.....circuit, do hereby certify that the above and foregoing is a true, full, correct and complete transcript of the record, assignment of errors and all proceedings had in cause No..... equity, wherein A. B. is complainant and C. D. is defendant, as fully as the same remains on file and of record in my office at.....,

Witness my hand officially and the seal of said court at....., the .....day of....., A. D. 19...

Clerk, etc.

See *Redfield v. Parks*, 130 U. S. 624, 32 L. ed. 1053, 9 Sup. Ct. Rep. 642, *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.* 5 C. C. A. 53, 2 U. S. App. 606, 55 Fed. 131; *Meyer v. Mansur & T. Implement Co.* 29 C. C. A. 465, 52 U. S. App. 474, 85 Fed. 874; *Idaho & O. Land Improv. Co. v. Bradbury*, 132 U. S. 509, 33 L. ed. 433, 10 Sup. Ct. Rep. 177; *Garneau v. Dozier*, 100 U. S. 7, 25 L. ed. 536.

If part of the proceedings are omitted by the direction of counsel it may be stated thus: That the foregoing is a true



copy of the record, assignments of error and proceedings, except that certain portions thereof are omitted by direction of appellant's counsel, the omitted portions being (designate what was omitted), etc.

If there should be an issue raised as to the omitted portions, and it does not appear that the omitted parts are "necessary to a hearing," it will not support a motion to dismiss the appeals. If, however, the appellee thinks the transcript is defective, then he should resort to a certiorari to bring up a complete record. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 237, 238; *Cutting v. Tavares, O. & A. R. Co.* 9 C. C. A. 401, 23 U. S. App. 363, 61 Fed. 150, as to sufficiency of a transcript where the records were burned.

If the clerk refuses to sign the certificate, you may reach him by mandamus. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* supra. If there be no certificate, leave will be granted to withdraw the record and supply it. *Hodges v. Vaughan*, 19 Wall. 12, 22 L. ed. 46. Matters tacked to the transcript, and not certified, are not part of the record. *Grand County v. King*, 14 C. C. A. 421, 32 U. S. App. 402, 67 Fed. 945.

If appeal is dismissed, you may take second appeal if in time. *Evans v. State Nat. Bank*, 134 U. S. 330, 33 L. ed. 917, 10 Sup. Ct. Rep. 493.

### *Bill of Exceptions.*

It is seen that a true copy of a bill of exceptions is required to be certified with assignment of errors, etc., by circuit court of appeals rule 14, sec. 1. This applies to writs of error, and not appeals, as a bill of exceptions proper is not known to equity. As said in *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 325: "The practice of bringing into the record by bill of exceptions pleadings on papers which the court has refused to allow is not known to the Federal courts in equity cases." Ibid. 329, 330. In this case the party was permitted to have certified to the appellate court a rejected document not as a part of the record, but for the information of the court. See p. 336 for form of Order.

The Judges of the Federal Courts in chancery act upon the S. Eq.—47.

rule that they are not required to certify to a bill of exceptions in Equity. *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 177; *Morrison v. Burnette*, 83 C. C. A. 391, 154 Fed. 617; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 369; *Laurel Oil & Gas Co. v. Galbreath Oil & Gas Co.* 91 C. C. A. 196, 165 Fed. 162; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243.

Thus, where exceptions are taken to the admission of evidence during the progress of an equity cause, they must be entered at the time and become incorporated into the record, and objections made to any proceedings must be noted at the time made, and so appear in the record, and not in the form of a separate bill of exceptions. Supreme Court rule 13; circuit court of appeals rule 12; *Kalamazoo Railway Supply Co. v. Duff Mfg. Co.* 113 Fed. 264; *Goodwin v. Fox*, 129 U. S. 630, 32 L. ed. 815, 9 Sup. Ct. Rep. 567; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 179; *Dodge v. Norlin*, 66 C. C. A. 425, 133 Fed. 369. If the exceptions do not thus appear, the objections will be considered waived. *Ibid.*; *Potter v. United States*, 58 C. C. A. 231, 122 Fed. 55 and cases cited; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243; *Massenberg v. Denison*, 46 C. C. A. 120, 107 Fed. 18, *Maxim-Nordenfelt Guns & Ammunition Co. v. Colt's Patent Firearms Mfg. Co.* 103 Fed. 39; *Fayerweather v. Ritch*, 89 Fed. 529; *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 877; *Mears v. Lockhart*, 36 C. C. A. 239, 94 Fed. 274; *Michigan Ins. Bank v. Eldred*, 143 U. S. 298, 36 L. ed. 163, 12 Sup. Ct. Rep. 450; *Blease v. Garlington*, 92 U. S. 4-7, 23 L. ed. 522, 523; *Adee v. J. L. Mott Iron Works*, 46 Fed. 39. (See "Assignment of Error to the Admission or Rejection of Evidence," chapter 108).

An exception to the rule may be found in a case where some issue has been sent to a jury for trial. There a bill of exceptions to admission of evidence must be taken and preserved and incorporated in the record. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 333.

## CHAPTER CXIV.

### PROCEEDINGS AFTER TRANSCRIPT DELIVERED.

#### *Filing Transcript.*

It is the duty of the appellant to file the transcript with the clerk of the appellate court on or before the return day, whether it falls in vacation or term. On failure to comply with the rule the defendant, or appellee, may have the case docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court in which the decree was rendered, stating the case and certifying that an appeal had been duly sued out and allowed. In no case shall the appellant be entitled to docket the case after the same has been dismissed on certificate, unless by order of the court. Circuit court of appeals rule 16.

It will be seen, by the terms of this rule, that the time in which the transcript is to be filed is directory, as it provides for an enlargement of the time for good cause shown upon application to the judge signing the citation, or to any judge of the court of appeals, in whose sound discretion relief, if needed, lies. *Florida v. Charlotte Harbor Phosphate Co.* 17 C. C. A. 472, 30 U. S. App. 535, 70 Fed. 883; *Jones v. Mann*, 18 C. C. A. 442, 25 U. S. App. 700, 72 Fed. 85; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 314; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 880; *Sparrow v. Strong*, 3 Wall. 103, 18 L. ed. 49, 2 Mor. Min. Rep. 320; *West Chicago Street R. Co. v. Ellsworth*, 23 C. C. A. 393, 46 U. S. App. 603, 77 Fed. 665; *Re Alden Electric Co.* 59 C. C. A. 509, 123 Fed. 415; See *Hill v. Chicago & E. R. Co.* 140 U. S. 53, 35 L. ed. 331, 11 Sup. Ct. Rep. 690; and *Gwin v. Breedlove*, 15 Pet. 285, 10 L. ed. 741. The order extending the time,

when obtained, must be filed with the clerk of the court of appeals. Circuit court of appeals rule 16.

An order enlarging the time, signed by a district judge who did not sign the citation, would be void unless he was at the time sitting as a member of the circuit court of appeals. *West v. Irwin*, 4 C. C. A. 401, 9 U. S. App. 547, 54 Fed. 419.

An application to enlarge the time may be applied for after the time has elapsed to file the record, where it had been filed and docketed before the motion to dismiss was made (*West Chicago Street R. Co. v. Ellworth*, 77 Fed. 664; *Andrews v. Thum*, 12 C. C. A. 77, 21 U. S. App. 459, 64 Fed. 150; *Re Alden Electric Co.* 59 C. C. A. 509, 123 Fed. 415; *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 879; *Altenberg v. Grant*, 28 C. C. A. 244, 54 U. S. App. 312, 83 Fed. 980; *Bingham v. Morris*, 7 Cranch, 99, 3 L. ed. 281; *Equitable Life Assur. Soc. v. Tolbert*, 76 C. C. A. 212, 145 Fed. 339, and cases cited); and so when both made simultaneously. *Owings v. Tiernan*, 10 Pet. 24, 9 L. ed. 333.

### *Waiver of Irregularity in Filing Transcript.*

A general appearance of appellee waives defects (*Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849), and defendant moving for new bond waives the transcript not being filed and docketed in time (*Waldron v. Waldron*, 156 U. S. 378, 39 L. ed. 457, 15 Sup. Ct. Rep. 383).

### *Docketing Case.*

By rule 9 of the Supreme Court and rule 16 of the circuit court of appeals it is made the duty of appellant to docket the case by or before the return day, whether in vacation or term time, unless for good cause shown the time be enlarged by the judge signing the citation, or by one of the judges of the circuit court of appeals.

A failure to docket the case in time gives appellee the opportunity of dismissing the case on certificate as in cases when the transcript has not been filed. See "Filing Transcript."

Upon docketing the case the appearance of counsel for the party docketing must be entered, and counsel for appellee

should notify the clerk to enter his appearance. Briefs will not be received from counsel who have not entered an appearance, and to enter an appearance counsel must be enrolled as members of the bar of the court in which the case is docketed. Circuit court of appeals rule 7.

By circuit court of appeals rule 17, the clerk docket the case in chronological order, and in its time it is placed on the trial docket, the record is ordered printed (circuit court of appeals rule 23), and it is assigned for a particular day for argument, of which the clerk gives timely notice. See amended rules fifth circuit, rule 35.

### *Certificate of Clerk Necessary to Dismiss Appeal.*

The *certificate* of the clerk below as a basis for dismissal is imperative; it will be required though the appellant has deposited a transcript in the circuit court of appeals, where the defendant seeks to docket and dismiss. *Macomb v. Armstead*, 10 Pet. 407, 9 L. ed. 473; see also *West v. Brashéar*, 12 Pet. 101, 9 L. ed. 1016. It must state the case and certify that an appeal has been sued out and allowed. *United States v. Gomez*, 23 How. 326, 16 L. ed. 552.

The certificate must be regular, and the names of all the parties to the record must be distinctly set forth. *Smith v. Clark*, 12 How. 22, 13 L. ed. 876; *Holliday v. Batson*, 4 How. 645, 11 L. ed. 1140.

The filing of a certified copy of the record in the court of appeals would be sufficient. *United States v. Fremont*, 18 How. 36, 15 L. ed. 302.

### *Printing Record.*

The appellant is required, at least six days before the case is called for argument, to have printed and file with the clerk twenty copies of the record, unless a different order is made by the court upon application. Circuit court of appeals rule 23. The appellant must furnish three copies of the printed record to adverse counsel at least six days before the argument.

In printing the record counsel may stipulate as to what parts of the record shall be printed, and that it shall be heard on the record as printed.

If the record is not printed when the case is reached in the regular call of the docket, you may move to dismiss it. *Lem Hing Dun v. United States*, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145.

The clerk of the appellate court attends to the printing of the record and its preparation for hearing, at the expense of the appellant; the amount, however, is taxed as costs against the losing party. Circuit court of appeals rule 23.

By rule 23 of the fifth circuit the clerk makes an estimate of the printing, notifying the party docketing of the cost. If he does not pay the amount in a reasonable time, then the clerk notifies the adverse party, and he may pay it. If neither party pays, and it is not printed when reached on call, it will be dismissed.

It is made the duty of the clerk to have the record printed when the amount is paid, and to furnish to counsel appearing for both parties three copies each of the printed record. At least twenty-five copies of the record must be printed, and the cost of printing is finally taxed up against the losing party, or as directed by the court.

### *Diminution of the Record.*

Presumptively the transcript filed is correct (*Randolph v. Allen*, 19 C. C. A. 353, 41 U. S. App. 117, 73 Fed. 23), but if the transcript be defective in that something has been omitted or improperly copied (circuit court of appeals rule 18), then the practice is to suggest a diminution of the record, and have the omitted part or defective record properly certified up. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 245, *Cunningham v. German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932; *Chappell v. United States*, 160 U. S. 506, 40 L. ed. 512, 16 Sup. Ct. Rep. 397; *Merrill v. Floyd*, 2 C. C. A. 58, 5 U. S. App. 90, 50 Fed. 849; *Blanks v. Klein*, 1 C. C. A. 254, 2 U. S. App. 155, 49 Fed. 1; *Hoskin v. Fisher*, 125 U. S. 217-224, 31 L. ed. 759-762, 8 Sup. Ct. Rep. 834; *Missouri, K. & T. R. Co. v. Dinsmore*, 108 U. S. 31, 27 L. ed. 640, 2 Sup. Ct. Rep. 9; *Kansas v. Meriwether*, 96 C. C. A. 281, 171 Fed. 42; *Florida, C. R. Co. v. Schutte*, 100 U. S. 644, 25 L. ed. 605.

The proceeding cannot be used as a writ of error, but only as auxiliary to bring up a full record. *Ibid.* American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; Travis County v. King Iron Bridge & Mfg. Co. 34 C. C. A. 620, 92 Fed. 693; Re Tampa Suburban R. Co. 168 U. S. 587, 42 L. ed. 590, 18 Sup. Ct. Rep. 177.

The suggestion of a diminution of the record must be made by motion in the appellate court. Circuit court of appeal rule 18; Supreme Court rule 14. The motion must be made at the *first* term of the entry of the case, unless upon special cause shown to the court; and the motion must state the facts upon which the application is founded, and be verified by affidavit if not admitted by the other party. *Chappell v. United States*, 160 U. S. 506, 40 L. ed. 512, 16 Sup. Ct. Rep. 397.

It seems that where a necessary part of the record that has been omitted was presented with the motion, it may be admitted without certiorari, if certified to by the clerk below. *Burnham v. North Chicago Street R. Co.* 30 C. C. A. 594, 59 U. S. App. 274, 87 Fed. 168. Mere clerical errors in transcript on certificate may be amended by the court. *Hudgins v. Kemp*, 18 How. 534, 15 L. ed. 512.

## CHAPTER CXV.

### DISMISSING APPEALS.

The transcript being properly filed, the next inquiry of the appellee is as to whether any cause exists to dismiss the appeal.

There are many causes stated in the rules, and I will briefly enumerate them.

First. The appellant may dismiss with leave of the court. *Donallan v. Tannage Patent Co.* 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385; *United States v. Griffith*, 141 U. S. 212, 35 L. ed. 719, 11 Sup. Ct. Rep. 1105; *Greene v. United Shoe Machinery Co.* 60 C. C. A. 93, 124 Fed. 963, 964.

Second. When the appellant and appellee shall, in vacation by their counsel, sign and file an agreement with the clerk, in writing, directing the case to be dismissed, the clerk may enter the order. Supreme Court rule 28; circuit court of appeals rule 20.

Third. A failure to file a transcript in the appellate court and docket the cause on or before the return day of the citation is a ground of dismissal. Supreme Court Rule 9; circuit court of appeals rule 16; *Wong Sang v. United States*, 75 C. C. A. 383, 144 Fed. 968; see *The Kawaiiani*, 63 C. C. A. 347, 128 Fed. 879.

Fourth. When no counsel appears or brief is filed for appellant at the time the case is called for trial. Circuit court of appeals rule 22; *Lem Hing Dun v. United States*, 1 C. C. A. 209, 7 U. S. App. 18, 49 Fed. 145; Supreme Court rule 16.

Fifth. When a case is reached in regular order and neither party has entered an appearance. Circuit court of appeals rule 22, sec. 3; Supreme Court rule 18.

Sixth. Failure of counsel for appellant to have the record printed by the time the case is reached on regular call. Circuit court of appeals rule 23; Supreme Court rule 10, sec. 2.



Seventh. Failure of appellant to file with the clerk of the court of appeals at least six days before the day assigned for argument twenty copies of a printed brief. Circuit court of appeals rule 24, sec. 5; Supreme Court rule 21, sec. 5.

Eighth. When representatives of the deceased appellant are cited and do not appear within sixty days, the appellee may have the appeal dismissed. Circuit court of appeals rule 19, sec. 1.

Ninth. An appeal will be dismissed when the parties have settled their differences and the further prosecution is collusive. *Benner v. Hayes*, 26 C. C. A. 271, 53 U. S. App. 376, 80 Fed. 953; *Weaver v. Kelly*, 34 C. C. A. 423, 92 Fed. 421; *United States v. Elliott*, 74 Fed. 94; *Mills v. Green*, 159 U. S. 654, 40 L. ed. 294, 16 Sup. Ct. Rep. 132; *Thorp v. Bonnifield*, 177 U. S. 19, 44 L. ed. 653, 20 Sup. Ct. Rep. 559; *South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co.* 145 U. S. 301, 36 L. ed. 712, 12 Sup. Ct. Rep. 921. Or when there is no material issue. *Ibid.*; *Allen v. Georgia*, 166 U. S. 140, 41 L. ed. 949, 17 Sup. Ct. Rep. 525. Or when the question is moot, or some abstract proposition. *Kimball v. Kimball*, 174 U. S. 162, 43 L. ed. 934, 19 Sup. Ct. Rep. 639; *United States v. Evans*, 213 U. S. 297, 53 L. ed. 803, 29 Sup. Ct. Rep. 507; *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132. Or where relief becomes impossible. *Mills v. Green*, 159 U. S. 653, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321; *Katz v. San Antonio*, 34 C. C. A. 10, 63 U. S. App. 452, 91 Fed. 567; *Gamewell Fire Alarm Teleg. Co. v. Municipal Signal Co.* 23 C. C. A. 250, 33 U. S. App. 714, 77 Fed. 492; *Lockwood v. Wickes*, 21 C. C. A. 257, 36 U. S. App. 321, 40 U. S. App. 136, 75 Fed. 123. As when statutes repealed. *Flour Inspectors v. Glover*, 160 U. S. 170, 40 L. ed. 382, 16 Sup. Ct. Rep. 321, 161 U. S. 103, 40 L. ed. 632, 16 Sup. Ct. Rep. 492. And may hear evidence as to dismissal. *Ridge v. Manker*, 67 C. C. A. 596, 132 Fed. 599-601, and cases cited. *Ransom v. Pierre*, 41 C. C. A. 585, 101 Fed. 665.

Tenth. An appeal will be dismissed if no citation is sued out, or sued out and not served (*Peace River Phosphate Co. v. Edwards*, 17 C. C. A. 358, 30 U. S. App. 513, 70 Fed.

728); but the regular appearance of appellee waives it (*Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849).

Eleventh. An appeal will be dismissed when based on grounds affecting the jurisdiction of the court *a quo*, or the jurisdiction of the appellate court (*Gorman Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 363-365; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449-453, 44 L. ed. 842-844, 20 Sup. Ct. Rep. 690), as when the appeal was not sued out within the time limited (*Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 284).

Twelfth. When decree joint, and appeal by one without notice to others. *Fitzpatrick v. Graham*, 56 C. C. A. 95, 119 Fed. 353 and cases cited.

Thirteenth. When no assignment of errors or brief. *Moline Trust & Sav. Bank v. Wiley*, 79 C. C. A. 446, 149 Fed. 734; *Fitch v. Richardson*, 77 C. C. A. 422, 147 Fed. 196.

### *Motion to Dismiss.*

By circuit court of appeals rule 21, sec. 3, all motions must be reduced to writing and contain a brief statement of the facts and objects of the motion; and no motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party or his counsel, of the motion and time of hearing. Supreme Court rule 6, sec. 3.

In the Supreme Court the time of service is three weeks before the day of submission, and with the notice of the motion must be furnished a copy of the brief or argument to be served on opposite counsel. *Carey v. Houston & T. C. R. Co.* 150 U. S. 179, 37 L. ed. 1043, 14 Sup. Ct. Rep. 63

The Supreme Court will not hear motions to dismiss appeals before the record is printed, if there is any question about the facts upon which the motion is based (*St. Louis Nat. Bank v. United States Ins. Co.* 100 U. S. 43, 25 L. ed. 547); but it is only necessary to print so much of the record as will enable the court to act understandingly without referring to the transcript. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 542, 5 U. S. App. 97, 51 Fed. 931; *Waterville v. Van Slyke*, 115 U. S. 290, 29 L. ed. 406, 6 Sup. Ct. Rep. 39.

Again, in the Supreme Court the hearing is by brief and

not oral argument, unless invited. Supreme Court rule 6, sec. 4; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, 14 Sup. Ct. Rep. 63. If oral argument is desired, counsel will be notified, and it will be heard in connection with the hearing on the merits.

In the circuit court of appeals the motion may be heard at such time as the court will indicate, and one hour to each side is given to argue motions. Circuit court of appeals rule 21, sec. 2.

The motion must contain within itself the statement of the facts upon which the motion is based, and after one motion has been filed no other can be filed except by permission of the court. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 2 C. C. A. 54, 25 U. S. App. 97, 51 Fed. 931, S. C. 9 C. C. A. 468, 21 U. S. App. 50, 61 Fed. 238.

### *Motion to Dismiss.*

A. B., Appellant, }  
vs. }  
C. D., Appellee. }

In the Circuit Court of Appeals for  
the.....Circuit, at.....

### *Motion to Dismiss.*

And now comes appellee and moves the court to dismiss the appeal filed herein and for cause shows:

First. That it appears that said appeal was not sued out within six months, etc.

Second. Because, etc.

R. F.,  
Solicitor.

Have the following notice served:

Title as in case appealed.

Please take notice that I have filed a motion to dismiss the appeal taken in this cause, a copy of which is attached to this notice, and that on the .....day of....., A. D. 19..., or as soon thereafter as counsel can be heard, I will submit the same to the Honorable Circuit Court of Appeals at.....for decision.

R. F.,  
Solicitor.

### *Effect of Death on the Appeal.*

Section 9 of the judiciary act of 1875 provides that when either party to a final decree dies, or shall die before the time

allowed for taking an appeal has expired, it shall not be necessary to revive the suit by any formal proceedings. The representative of such deceased party may file in the clerk's office a duly certified copy of his appointment and thereupon may enter an appeal. If the party in whose favor the decree is entered dies before appeal taken, notice to his representatives from the appellate court shall be given as provided in case of death after appeal taken. *Dolan v. Jennings*, 139 U. S. 385, 35 L. ed. 217, 11 Sup. Ct. Rep. 584.

Supreme Court rule 15 provides that if either party shall die *pending* the appeal, the representative may voluntarily come in and be admitted a party to the appeal. If they do not voluntarily come in the other party may suggest the death on the record, and thereupon obtain, on motion, an order that unless such representatives shall become parties within the first *ten* days of the *ensuing* term, the party moving, if defendant, will have the appeal dismissed, and if appellant he shall be entitled to open the record and have on hearing the judgment reversed if it be erroneous; provided, that a copy of such order shall be published in a newspaper of general circulation within the State or district from which the case is brought for three successive weeks and at least sixty days before the beginning of the term of the appellate court next ensuing.

Section 2 of the rule provides that if the representative of the party does not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel an appearance, the case shall abate.

Section 3 provides that when either party desires to sue out an appeal, and the other party is dead and has no representative in the jurisdiction so that the suit cannot be revived, but the deceased has a representative in another State, the party may have the judgment stayed and procure the appeal; but he must, within thirty days from the commencement of the term to which the appeal is returnable, make a suggestion in the appellate court, supported by affidavit, setting up that the party was dead when the appeal was taken and had no representative within the jurisdiction of the court so that the suit could not be revived, but that the party has a representative in another State or Territory (setting forth where specifically).

Upon this suggestion he may obtain an order that unless

such representatives shall appear within *ten* days after the commencement of the next ensuing term the appellant can open the record and have the decree reversed, if erroneous. But the appellant must have a citation issued reciting the substance of the order, which must be served on the representative at least sixty days before the beginning of the next term of the appellate court.

Rule 19 of the circuit court of appeals is to the same effect, with the exception of certain changes, to which I will call your attention.

First. Rule 19 of the circuit court of appeals provides that a party may suggest the death on the record, and, on motion, obtain an order that unless the representative shall become a party within sixty days, instead of within ten days after the next ensuing term, as in the Supreme Court rule, the party moving for such order, if defendant or appellee, shall have the right to have the appeal dismissed; and if appellant, he shall be entitled to open the record and proceed; provided, however, that a copy of every such order be served personally on the representative at last thirty days before the expiration of such sixty days, instead of being published in a newspaper, as required in the Supreme Court rule.

Again, the third section of circuit court of appeals rule 19 requires the appellant to file his suggestion of death within thirty days from filing the record in the circuit court of appeals, instead of within thirty days after the commencement of the term to which the appeal is returnable.

Again, circuit court of appeals rule 19, sec. 3, requires the representative to make himself a party within ninety days from the date of the order, instead of within ten days after the beginning of the next ensuing term, as in the Supreme Court rule.

Again, in the circuit court of appeals rule the service is to be made on the representative at least thirty days before the expiration of the ninety days, instead of sixty days before the next ensuing term, as in the Supreme Court rule.

Again, by the circuit court of appeals rule the representative is required to appear within ten days after the ninety days has expired, instead of being required to appear by the tenth day of the next ensuing term, as in the Supreme Court rule.

(See "Parties Dying after Decree," chapter 112), see, as to abating appeal by death, *Mills v. Green*, 159 U. S. 655, 40 L. ed. 294, 16 Sup. Ct. Rep. 132; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 703, 38 L. ed. 322, 14 Sup. Ct. Rep. 533. As to form of suggestion, see *Howth v. Owens*, 30 Fed. 910. As to order permitting representatives to be made parties, see *Edmonson v. Bloomshire*, 7 Wall. 307, 19 L. ed. 91.

## CHAPTER CXVI.

### SUBMITTING THE CASE TO THE APPELLATE COURT.

We have seen that the record must be printed in order to be submitted, and copies furnished counsel.

#### *Briefs.*

The case may be submitted on briefs alone, or on briefs and oral argument. The briefs must be printed and filed by the appellant at least six days before the case is called for argument. He must file with the clerk of the court of appeals twenty copies, at least, for the use of the court and counsel, one copy being sent, on application, to each of the counsel on the opposite side. If in the Supreme Court, he must file six days at least before the case is called for argument twenty-five copies of his brief, one copy of which shall, on application, be furnished to each of the counsel engaged on the opposite side.

The counsel for *appellee* shall file with the clerk of the circuit court of appeals twenty copies of his printed brief at least three days before the case is called for argument, and if in the Supreme Court he must file twenty-five copies at least three days prior to the case being called for argument. Supreme Court rule 21; circuit court of appeals rule 24; Wisconsin, *M. & P. R. Co. v. Jacobson*, 179 U. S. 294, note 1, 45 L. ed. 197, 21 Sup. Ct. Rep. 115; *Milwaukee v. Shailer & S. Co.* 34 C. C. A. 112, 91 Fed. 858.

The form and order of statement in the brief are fully set forth in Supreme Court rule 21 and circuit court of appeals rule 24. *Ibid.*; *Lincoln v. Sun Vapor Street Light Co.* 8 C. C. A. 253, 19 U. S. App. 431, 59 Fed. 756; *Paxson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 877; *Balliet v. United States*, 64 C. C. A. 201, 129 Fed. 693.

The brief must set forth the assignment of errors relied upon

(Haldane v. United States, 16 C. C. A. 447, 32 U. S. App. 607, 69 Fed. 819), and unless the error in the record is flagrant it will not be noticed if not assigned in the brief. Repauno Chemical Co. v. Victor Hardware Co. 42 C. C. A. 106, 101 Fed. 948; circuit court of appeals rule 24, sec. 4; Supreme Court rule 21, sec. 4; Ibid.; Ætna Indemnity Co. v. J. R. Crowe Coal & Min. Co. 83 C. C. A. 431, 154 Fed. 558, 559; Moline Trust & Sav. Bank v. Wylie, 79 C. C. A. 446, 149 Fed. 734, and cases cited; Chicago G. W. R. Co. v. Egan, 86 C. C. A. 230, 159 Fed. 46; Walton v. Wild Goose Min. & Trading Co. 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688; Mitchell v. Marker, 25 L.R.A. 33, 10 C. C. A. 306, 22 U. S. App. 325, 62 Fed. 140; McClellan v. Pyeatt, 1 C. C. A. 613, 4 U. S. App. 319, 50 Fed. 686; Sovereign Camp, W. W. v. Jackson, 38 C. C. A. 208, 97 Fed. 382; Western Assur. Co. v. Polk, 44 C. C. A. 104, 104 Fed. 649.

### *Form and Size.*

The form and size of printed briefs are controlled by circuit court of appeals rule 26 and Supreme Court rule 31.

### *Not Filed.*

A brief will not be filed if counsel has not entered an appearance, and counsel must be enrolled as a member of the bar of that court.

### *Oral Argument.*

Oral argument, if desired, will be heard on the day the case is set for hearing, and is controlled by circuit court of appeals rule 25 and Supreme Court rule 22. It will be seen that in the Supreme Court two hours are allowed to each side, while in the circuit court of appeals the time varies. In the fifth circuit, by an amendment adopted February 27, 1894, to rule 24, one hour to open and one half hour to reply is allowed to appellant, and one hour to appellee.

### *Rules Applied When Cause Called for Hearing.*

When no counsel appears, and no brief has been filed for



appellant, defendant may have plaintiff called, and on failure to answer, the appeal may be dismissed (rule 22, sec. 1; *Fitch v. Richardson*, 77 C. C. A. 422, 147 Fed. 196; *Portland Co. v. United States*, 15 Wall. 2, 21 L. ed. 113; *Ryan v. Koch*, 17 Wall. 19, 21 L. ed. 611); and by Supreme Court rule 16 he may, instead of dismissing the case, have it opened and affirmed.

If defendant fails to appear when the case is called, the court may permit the appellant to proceed. Circuit court of appeals rule 22, sec. 2; Supreme Court rule 17.

When neither party has appeared the case is dismissed at the cost of appellant. Circuit court of appeals rule 22, sec. 3; Supreme Court rule 18.

By Supreme Court rule 19, if a case is called at two successive terms, and neither party is ready for argument, it will be dismissed at the cost of the appellant unless cause shown for further postponement.

### *Amendments Allowed in Appellate Court.*

We have already referred to proceeding by certiorari when the record is defective; but I will briefly refer to amendments permitted to cure defects in a record properly certified, and, first, as to *amendments to show jurisdiction*.

A defective allegation of citizenship may be amended in the appellate court by consent of both parties, but in the absence of such consent the judgment will be reversed to allow an amendment in accordance with the facts, but only to submit that issue. U. S. Rev. Stat. sec. 954, U. S. Comp. Stat. 1901, p. 696; circuit court of appeals rule 11, sec. 1 and 3; *Preferred Acci. Ins. Co. v. Barker*, 32 C. C. A. 124, 58 U. S. App. 171, 88 Fed. 814; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 164; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 729; *United States v. Hopewell*, 2 C. C. A. 510, 5 U. S. App. 137, 51 Fed. 798. As to motion to amend, see *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 3.

Amendments to cure defective pleadings touching the merits  
S. Eq.—48.

of the case will not be allowed; but where equity requires it, or justifies it, the case will be remanded to the lower court with permission to make the amendments, otherwise it cannot be done after the decision in the appellate court. *Ibid.*; *Post v. Beacon Vacuum Pump & Electrical Co.* 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 6; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 413, 415, 35 L. ed. 1061, 1062, 12 Sup. Ct. Rep. 188. See *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 911, 912.

Such amendment in the lower court must be based on a petition, or motion in the appellate court, for permission to apply to the court below to make the amendments, and when granted, the appellate court should order that the petitioner should have permission to apply to the court below to file further pleadings in pursuance of the suggested amendment. *Ibid.* But an amendment which seeks to set up a new or additional cause of action will not be allowed. *Martin & H. Cash-Carrier Co. v. Martin*, 18 C. C. A. 234, 33 U. S. App. 373, 71 Fed. 519; *American Bell Teleph. Co. v. United States*, 15 C. C. A. 569, 33 U. S. App. 236, 68 Fed. 542. See *McNulta v. West Chicago Park*, 39 C. C. A. 545, 99 Fed. 328, amending by making new bond and bringing in new parties.

### *Defective Procedure.*

If there is any failure on the mere procedure to perfect the appeal, you may apply to the appellate court to have it perfected. Thus, if it be in mere matters of form, or names which can be cured by the record, the appellate court will permit the amendment if in furtherance of justice and not prejudicial to the adverse party (U. S. Rev. Stat. sec. 1005, U. S. Comp. Stat. 1901, p. 714; *Copland v. Waldron*, 66 C. C. A. 271, 133 Fed. 218; *Estis v. Trabue*, 128 U. S. 228, 32 L. ed. 438, 9 Sup. Ct. Rep. 58; *Walton v. Marietta Chair Co.* 157 U. S. 347, 39 L. ed. 727, 15 Sup. Ct. Rep. 626; *United States v. Schoverling*, 146 U. S. 82, 36 L. ed. 895, 13 Sup. Ct. Rep. 24. See *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 729), or a mere clerical error in the transcript (*Hudgins v. Kemp*, 18 How. 530, 15 L. ed. 511); but if some necessary step to give the court jurisdiction is not

**apparent** in the record, as where no allowance of appeal is shown in the records of the court below, or in the transcript, though in fact the appeal was allowed, the proper practice is not by certiorari, but by motion for permission to apply to the court below to enter the allowance of the appeal *nunc pro tunc*, and then have the entry certified up (*Chicago v. Bigelow*, 131 U. S. xciii. Appx. and 19 L. ed. 257). But if the allowance of appeal was noted, and not certified in transcript, then certiorari applies. See "Diminution of Record."

*Rules Applied in Considering Cases on Appeal.*

Assuming the appeal is perfected, there are certain rules evolved out of the cases which are applied by appellate courts to which I will call your attention.

First. The first and fundamental question is that of the jurisdiction of the appellate court, and of the court from which the appeal came; and this question the court is bound to ask itself, whether suggested or not. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *Continental Nat. Bank v. Burford*, 191 U. S. 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 48 L. ed. 140, 24 Sup. Ct. Rep. 63; *Giles v. Teasley*, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 13; *Central Grain & Stock Exchange v. Board of Trade*, 60 C. C. A. 299, 125 Fed. 463; *Puget Sound Nav. Co. v. Lavendar*, 84 C. C. A. 259, 156 Fed. 361; *Yeandle v. Pennsylvania R. Co.* 95 C. C. A. 282, 169 Fed. 939; *McGilvra v. Ross*, 90 C. C. A. 398, 164 Fed. 604; *Gorman-Wright Co. v. Wright*, 67 C. C. A. 345, 134 Fed. 363; *Grace v. American Cent. Ins. Co.* 109 U. S. 283, 27 L. ed. 934, 3 Sup. Ct. Rep. 207; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 386, 28 L. ed. 465, 4 Sup. Ct. Rep. 510. And the same rule applies in removals. *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 725-729.

Second. In equity cases the appellate court considers the whole case, both fact and law. *Waterloo Min. Co. v. Doe*, 27 C. C. A. 504, 8 U. S. App. 411, 82 Fed. 51, 19 Mor. Min. Rep. 1, and cases cited; *Carson v. Combe*, 29 C. C. A. 660, 52 U. S. App. 622, 86 Fed. 210.

Third. The decree entered when the evidence is conflicting is presumptively correct. *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 88, and cases cited; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co.* 43 C. C. A. 511, 104 Fed. 243; *North American Exploration Co. v. Adams*, 104 Fed. 404, 12 Mor. Min. Rep. 65; *Daugherty v. Bogy*, 44 C. C. A. 266, 104 Fed. 938.

Fourth. The presumption is that error has produced prejudice, and it is only when it is clearly apparent that no prejudice was suffered by the error that the appellate court will refuse to reverse. *Choctaw O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *United States v. Gentry*, 55 C. C. A. 658, 119 Fed. 75 and cases cited.

Fifth. Finding of court below in equity suits not conclusive. U. S. Rev. Stat. sec. 1012, U. S. Comp. Stat. 1901, p. 716. *Hendryx v. Perkins*, 59 C. C. A. 266, 123 Fed. 268.

Sixth. Case must be a real case. *Jones v. Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611; *American Book Co. v. Kansas*, 193 U. S. 52, 48 L. ed. 614, 24 Sup. Ct. Rep. 397; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132. What may be heard on second appeal. *Olsen v. North Pacific Lumber Co.* 55 C. C. A. 665, 119 Fed. 77.

### *Rehearing.*

Rule 29 of the circuit court of appeals provides for rehearing, and the time within which to be filed. See Appendix. It is not granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court grants it, and at same term of court (*The Comforts*, 23 Blatchf. 371, 32 Fed. 327); but this requirement is for the protection of the court, and may be waived. *Burget v. Robinson*, 59 C. C. A. 260, 123 Fed. 262; *Kirchberger v. American Acetylene Burner Co.* 73 C. C. A. 387, 142 Fed. 169; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 908; *Wright v. Gorman-Wright Co.* 81 C. C. A. 534, 152 Fed. 408; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 809. (See "Rehearing," chapter 99, and "Bill of Review," chapter 100.)

*The petition for.*—The petition for rehearing must conform to equity rule 29. 31 C. C. A. clxvii, 47 Fed. xiii. Hinds v. Keith, 6 C. C. A. 231, 13 U. S. App. 222, 314, 57 Fed. 11; The Dago, 63 Fed. 182; Kirchberger v. American Acetylene Burner Co. 73 C. C. A. 387, 142 Fed. 169.

*Filing; as to time.*

Brooks v. Burlington & S. W. R. Co. 102 U. S. 107, 26 L. ed. 91; Bushnell v. Crooke Min. & Smelt. Co. 150 U. S. 83, 37 L. ed. 1007, 14 Sup. Ct. Rep. 2; Allen v. Wilson, 21 Fed. 884; Bronson v. Schulten, 104 U. S. 410, 26 L. ed. 797; McGregor v. Vermont Loan & T. Co. 44 C. C. A. 146, 104 Fed. 710; Re Ives, 51 C. C. A. 541, 113 Fed. 913; Reynolds v. Manhattan Trust Co. 48 C. C. A. 249, 109 Fed. 99; United States v. 1,621 Pounds of Fur Clippings, 45 C. C. A. 263, 106 Fed. 163.

*Cannot introduce new question.*—Merriman v. Chicago & E. I. R. Co. 14 C. C. A. 36, 24 U. S. App. 641, 66 Fed. 663; Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 839; Moffet v. Quine, 95 Fed. 199; United States v. Hall, 11 C. C. A. 294, 298, 21 U. S. App. 402, 426, 63 Fed. 472.

## CHAPTER CXVII.

### APPEAL FROM CIRCUIT COURT OF APPEALS TO SUPREME COURT.

The Supreme Court exercises appellate jurisdiction over the circuit court of appeals. *Southern R. Co. v. Postal Teleg. Cable Co.* 179 U. S. 641, 45 L. ed. 355, 21 Sup. Ct. Rep. 249. By section 6 of the act of 1891, as we have already seen, the circuit court of appeals may certify to the Supreme Court at any time any questions or propositions of law in any case within its appellate jurisdiction, whether its jurisdiction be by the statute final or not; and the Supreme Court may answer the questions certified, or may order up the entire record, and decide the whole case as if originally brought before it on writ of error or appeal. *Grand Trunk Western R. Co. v. Reddick*, 88 C. C. A. 80, 160 Fed. 900; *Dickinson v. United States*, 98 C. C. A. 516, 174 Fed. 808; *Henningsen v. United States Fidelity & G. Co.* 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389. New Code, chap. 10, sec. 240.

Again, the Supreme Court may, by certiorari or otherwise, order up any case before the circuit court of appeals in which such court, under the act of 1891, has final appellate jurisdiction.

Again, in all cases not made final in the circuit court of appeals there is of right an appeal, by writ of error, to the Supreme Court when the matter in controversy shall exceed one thousand dollars besides costs, and if sued within *one* year after the entry of the decree. There is no right of appeal when cases made final in circuit court of appeals. Act 1891, sec. 6. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; *MacKenzie v. Pease*, 77 C. C. A. 233, 146 Fed. 743. See *Huff v. Bidwell*, 103 C. C. A. 520, 180 Fed. 374. New Code, sec. 241, chap. 10.

We then have four ways by which the Supreme Court may exercise appellate jurisdiction over the circuit court of appeals.

First. It may decide the legal question certified.

Second. It may order the whole record up and decide the case. Supreme Court rule 37; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; *Lau Ow Bew v. United States*, 144 U. S. 58, 36 L. ed. 344, 12 Sup. Ct. Rep. 517.

Third. In any case where the jurisdiction of the circuit court of appeals is final it may require it to be certified up. *Ibid.* See *Quinlan v. Green County*, 205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505.

Fourth. It may review, by appeal, any decree of the circuit court of appeals not made final in said court. *Ibid.*

*Review by Certifying Questions by Court of Appeals to Supreme Court.*

Any question in any case within the appellate jurisdiction of the circuit court of appeals may be certified by it for its instruction, and when answered, such answers are binding on the circuit court of appeals. Act of 1891, sec. 6. See sec. 239, New Code, chap. 10.

The form of the certificate is very simple, and requires that the questions should be introduced by a brief statement of the case and so much of the facts as are pertinent and necessary to understand the questions propounded. The questions must be purely of law, and not mixed questions of law and fact (*Emsheimer v. New Orleans*, 186 U. S. 42, 46 L. ed. 1046, 22 Sup. Ct. Rep. 770; *Chicago B. & Q. R. Co. v. Williams*, 205 U. S. 444-453, 51 L. ed. 875-878, 27 Sup. Ct. Rep. 559; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *German Ins. Co. v. Hearne*, 55 C. C. A. 84, 118 Fed. 134; *United States v. Union P. R. Co.* 168 U. S. 505-512, 42 L. ed. 559-561, 18 Sup. Ct. Rep. 167, and cases cited; *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Felsenheld v. United States*, 186 U. S. 134, 46 L. ed. 1089, 22 Sup. Ct. Rep. 740), and should be certified in cases only of grave doubt (*Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765, and cases cited; *Forsyth v. Hammond*, 166 U.

S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; Supreme Court rule 37). It must be pertinent and necessary to the decision of the particular case, and not abstract questions which may or not be applicable.

It cannot certify the whole case, but must be distinct points of law. *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 453, 51 L. ed. 878, 27 Sup. Ct. Rep. 559; *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *United States v. Union P. R. Co.* 168 U. S. 505, 48 L. ed. 559, 18 Sup. Ct. Rep. 167; *Graver v. Faurot*, 162 U. S. 435, 40 L. ed. 1030, 16 Sup. Ct. Rep. 799; *Cross v. Evans*, 167 U. S. 60, 42 L. ed. 77, 17 Sup. Ct. Rep. 733; *Emsheimer v. New Orleans*, 186 U. S. 33, 46 L. ed. 1042, 22 Sup. Ct. Rep. 770; *Columbus Watch Co. v. Robbins*, 148 U. S. 266-269, 37 L. ed. 445, 446, 13 Sup. Ct. Rep. 594; see *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 55, 56, 43 L. ed. 72, 18 Sup. Ct. Rep. 895, 19 Mor. Min. Rep. 370. The certification of a question of law is discretionary with the circuit court of appeals. *Louisville, N. A. & C. R. Co. v. Pope*, 20 C. C. A. 253, 46 U. S. App. 25, 74 Fed. 1; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765; *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 153, 23 C. C. A. 454, 46 U. S. App. 619, 77 Fed. 774; *Dickinson v. United States*, 98 C. C. A. 516, 174 Fed. 808. Rules governing certification under this act are governed by rules laid down in respect of certificates of division under U. S. Rev. Stat. secs. 652, 693, U. S. Comp. Stat. 1901, pp. 527, 566; *United States v. Union P. R. Co.* 168 U. S. 512, 42 L. ed. 561, 18 Sup. Ct. Rep. 167.

All of the judges of the court of appeals must sign the certificate, and cannot certify on *motion* if point is not doubtful. *German Ins. Co. v. Hearne*, 55 C. C. A. 84, 118 Fed. 134.

### *May Order Up Entire Record.*

The Supreme Court, instead of answering the questions, may, of its own motion, order up the entire record, and decide the whole matter in controversy as if brought originally before them. But in view of the sixth section of the act of 1891, it promulgated rule 37, the second clause of which provides that if application is made to this court that the whole record be



sent up for its consideration, the party making said application shall, as a part thereof, furnish this court with a certified copy of the whole of said record. This clearly contemplates that the court will only order up the entire case upon application accompanied with a full record (*Lau Ow Bew v. United States*, 144 U. S. 58, 36 L. ed. 344, 12 Sup. Ct. Rep. 517), but the case must be of sufficient gravity and importance to invoke such action (*Re Lau Ow Bew*, 141 U. S. 586, 587, 35 L. ed. 869, 870, 12 Sup. Ct. Rep. 43; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 765; *Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; *Re Woods*, 143 U. S. 205, 36 L. ed. 126, 12 Sup. Ct. Rep. 417).

### *By Certiorari.*

By certiorari all cases may be ordered up which are made final in the circuit court of appeals. *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 364; *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758. New Code, sec. 240.

The act of 1891, section 6, provides, among other things, for a revision by the Supreme Court, by certiorari or otherwise, of any case made final in the circuit court of appeals, and it is competent to order the case up, whether its advice is requested or not, except those that may be brought up by appeal or error. *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493. The power thus given is not affected by the stage or condition of the case as it exists in the court of appeals when the application for certiorari is made. It may be exercised before or after the decision of the circuit court of appeals, but the right may be lost by delay. *The Conqueror*, 166 U. S. 113, 114, 41 L. ed. 939, 940, 17 Sup. Ct. Rep. 510. See sec. 239, New Code, embodying sec. 6, act of 1891.

The Supreme Court has acted with much caution in granting writs of certiorari under the conditions mentioned, but,

while exercising its power sparingly, it will issue the writ when there are in issue questions of great public concern, or matters of gravity and importance (*Re Lau Ow Bew*, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43), as when there is a conflict between a State supreme court and the circuit court of appeals as to large property rights (*Forsyth v. Hammond*, 166 U. S. 514, 41 L. ed. 1098, 17 Sup. Ct. Rep. 665; *The Three Friends*, 166 U. S. 49, 41 L. ed. 913, 17 Sup. Ct. Rep. 495), and when the matter complained of is important in its immediate effect and far-reaching in its consequences (*Re Woods*, 143 U. S. 205, 206, 36 L. ed. 126, 12 Sup. Ct. Rep. 417). So where the decision would seriously affect the administration of justice (*Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385), or prevent extraordinary embarrassment in the conduct of a cause, it may be granted (*American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 384, 37 L. ed. 491, 13 Sup. Ct. Rep. 758).

It may be said of it, that it exists if some great necessity demands it, and though it may be invoked at any stage of the case, yet the Supreme Court will very rarely grant it before a final judgment in the circuit court of appeals.

### *Petition For.*

The certiorari is issued on the petition of a party to the suit, which may be as follows:

Title of case to be certified.

To the Honorable Supreme Court of the United States:

The petition of A. B., appellant, etc., respectfully shows to this Honorable Court that he filed in the Circuit Court of the United States for the .....district of.....a bill in equity on, to wit: the.....day of ....., A. D., 19... (here state substance of bill and prayer); that said cause was heard and determined and on the.....day of....., A. D. 19..., a decree was entered in said court as follows (insert decree). That thereafter, to wit, on the.....day of....., A. D. 19..., an appeal was allowed and perfected, and on the.....day of....., A. D. 19..., a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the.....circuit, sitting at....., and said cause was entered and docketed in said Court of Appeals, entitled A. B., appellant, vs. C. D., appellee, and numbered.....on said docket.

That the assignment of errors filed in said cause was as follows (here insert assignment of errors).

That afterwards, to wit, on the.....day of....., A. D., 19..., the case came on to be heard in the Circuit Court of Appeals before the Hon. ...., the Hon....., and the Hon....., and on the.....day of....., A. D. 19..., a decree was entered in said cause by the Circuit Court of Appeals of.....circuit as follows (state judgment of affirmance).

Your petitioner is advised that said judgment of the Circuit Court of Appeals, is final, and is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination under the act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

(Here recite the grounds upon which you seek the writ of certiorari, and it must appear that the case comes fully within the statute.)

Wherefore your petitioner respectfully prays that a writ of certiorari be issued under the seal of the court, directed to the United States Circuit Court of Appeals for the.....circuit, sitting at....., commanding the court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the act of Congress approved March 3, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction; and that the said judgment of the Circuit Court of Appeals be reversed by this Honorable Court, and for such further relief as may seem proper.

And your petitioner will ever pray.

Signed by petitioner or by his counsel.

The petition must be verified by the petitioner or by counsel as follows:

If by petitioner: "That he has read the foregoing petition by him subscribed, and the facts stated therein are true to the best of his information and belief."

If by counsel: State the fact of being counsel, and that he knows of the above proceedings had, and "that the facts therein stated are true to the best of his knowledge and belief."

### *Notice of the Application Must Be Given.*

If the writ is granted, the clerk of the United States Supreme Court issues it under the seal of the court, directed to the circuit court of appeals, and commanding it to send up the said cause with the record and proceedings had therein, and that the same be certified and removed to the Supreme Court without delay, so that the Supreme Court may act thereon, as according to law ought to be done.

By rule 37, promulgated by the Supreme Court May 11, 1891, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to the Supreme Court by the applicant as a part of the application.

### *Time.*

A party is entitled to a year within which to sue out the writ, and the fact that the mandate has gone down does not affect the right. *The Conqueror*, 166 U. S. 113, 41 L. ed. 939, 17 Sup. Ct. Rep. 510; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 284, 41 L. ed. 1005, 17 Sup. Ct. Rep. 572; *Ayres v. Polsdorfer*, 187 U. S. 595, 47 L. ed. 318, 23 Sup. Ct. Rep. 196; *Spencer v. Duplan Silk Co.* 191 U. S. 532, 48 L. ed. 291, 24 Sup. Ct. Rep. 174. It may be lost by delay. *Ibid.*

### *Effect of Granting the Writ.*

First. When the writ is granted by the Supreme Court it suspends the mandate of the circuit court of appeals, and all action by the circuit court of appeals, as well as of the circuit court from whence the appeal came. It is, in effect, a supersedeas (*Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 78 Fed. 659-662), except that the court below may perfect its judgment or allow a remittitur (*Hovey v. McDonald*, 109 U. S. 157, 27 L. ed. 890, 3 Sup. Ct. Rep. 136).

Second. When the writ is issued the case is before the court for its determination with the same power as if carried up by appeal. Act of 1891, sec. 6; *Panama R. Co. v. Napier Shipping Co.* 166 U. S. 280-284, 41 L. ed. 1004-1005, 17 Sup. Ct. Rep. 572. But see, *Hubbard v. Tod*, 171 U. S. 494, 43 L. ed. 253, 19 Sup. Ct. Rep. 14. The entire case is before the court for examination. Where an intervener applied for the writ, and the court entertained only errors assigned, and not whether there was error in the decree below of which other parties could have complained.

## CHAPTER CXVIII.

### APPELLATE POWER OF SUPREME COURT IN CASES NOT FINAL IN CIRCUIT COURT OF APPEALS.

The Supreme Court may review, by appeal or writ of error, all cases not made final in the circuit court of appeals by the sixth section of the judiciary act of 1891, when the matter in controversy exceeds *one thousand* dollars besides costs, and if taken in one year after the entry of the decree or judgment in the circuit court of appeals. *Huguley Mfg. Co. v. Galetton Cotton Mills*, see appendix sec. 6, act 1891, 184 U. S. 294, 46 L. ed. 547, 22 Sup. Ct. Rep. 452. See sec. 241, chap. 10, New Code, embodying the old law.

So, then, we have in all cases decided by the circuit court of appeals in which the jurisdiction was not dependent on diversity of citizenship entirely, or between aliens and citizens, or where the case arose under the patent, revenue, or admiralty laws, or in bankruptcy proceedings where the amount in controversy is under two thousand dollars, or judgments in arbitration claims (U. S. Stat. at L. Vol. 30, p. 426; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 41 L. ed. 368, 17 Sup. Ct. Rep. 40), a right of appeal to the Supreme Court from the decree of the circuit court of appeals, *provided only* that the matter in controversy exceeds one thousand dollars in value or amount besides costs, and that the appeal to be taken within *one year* from the entry of the decree. *Northern P. R. Co. v. Amato*, 144 U. S. 472, 36 L. ed. 509, 12 Sup. Ct. Rep. 740. The statutory amount must be in the controversy, but the fact may be shown by affidavit. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540; *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 806.

By enumerating the conditions in the act of 1891, under which the decrees in the circuit court of appeal are made final,

and declaring that all cases *not* made final in the circuit court of appeals may be carried as of right to the Supreme Court on appeal or error, much of the difficulty is removed in determining whether a case decided in the court of appeals can be taken by appeal or error, or must be taken by certiorari.

In determining the question of the finality of the judgment in the circuit court of appeals we must go back to the jurisdiction of the circuit court, and when that rests upon diversity of citizenship *alone*, or between aliens and citizens, or the case has been brought under the patent or revenue laws, or is a case in admiralty, then the decision of the circuit court of appeals is final and appeal or error to the Supreme Court would not lie. *Harding v. Hart*, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 846; *Spencer v. Duplan Silk Co.* 191 U. S. 527, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *Colorado Cent. Consol. Min. Co. v. Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 111, 41 L. ed. 368, 369, 17 Sup. Ct. Rep. 40; *Ayres v. Polsdorfer*, 187 U. S. 588-595, 47 L. ed. 315-318, 23 Sup. Ct. Rep. 196; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 294, 46 L. ed. 547, 22 Sup. Ct. Rep. 452; *Ex parte Jones*, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222. However, an appeal would lie when the case is between a foreign state and citizens of one of the United States, as it is not within the statute.

It may, then, be stated that under the act of March 3, 1891, where the jurisdiction of the circuit court of appeals was based on diversity of citizenship, or any of the grounds mentioned in section 6 of the act which have been referred to above, there can be no review by appeal or error by the Supreme Court of the judgment or decree of the circuit court of appeals in such cases. And this would be true, though after jurisdiction had attached in the circuit court issues are raised and decided bringing the case within either of the clauses set forth in section 5 of the act of 1891, and by virtue of which the case could have been carried direct to the Supreme Court, but was not, but carried to the circuit court of appeals. See authorities above; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 280, 45 L. ed. 861, 21 Sup. Ct. Rep. 646; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174;

Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; Arbuckle v. Blackburn, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; Watkins v. King, 55 C. C. A. 290, 118 Fed. 532; Loeb v. Columbia Twp. 179 U. S. 479, 45 L. ed. 285, 21 Sup. Ct. Rep. 174. Cannot be two appeals. *Ibid.*; Robinson v. Caldwell, 165 U. S. 362, 41 L. ed. 746, 17 Sup. Ct. Rep. 343.

If, however, the jurisdiction of the circuit court rests upon diversity of citizenship and a Federal question when the suit is begun, and appears in the pleading in due and logical form, and the case is carried to the circuit court of appeals, and judgment entered in said court, then such judgment would not be final, and an appeal or error would lie to the Supreme Court from the circuit court of appeals' judgment. *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Loeb v. Columbia Twp.* 179 U. S. 480, 481, 45 L. ed. 286, 287, 21 Sup. Ct. Rep. 174; *Fidelity Mut. Life Asso. v. Mettler*, 185 U. S. 315, 46 L. ed. 925, 22 Sup. Ct. Rep. 662; *Cound v. Atchison, T. & S. F. R. Co.* 173 Fed. 527; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 198 U. S. 292, 49 L. ed. 1053, 25 Sup. Ct. Rep. 691; *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148; *Union P. R. Co. v. Harris*, 158 U. S. 328, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843; *Press Pub. Co. v. Monroe*, 164 U. S. 110, 111, 41 L. ed. 368, 17 Sup. Ct. Rep. 40.

Not final unless depending wholly on diversity. *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 47 L. ed. 576, 23 Sup. Ct. Rep. 365.

In *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 186 U. S. 24, 46 L. ed. 1039, 22 Sup. Ct. Rep. 744, it is said when both parties who have been defeated in some part of their contention appeal to the circuit court of appeals, and the judgment is affirmed in favor of one party, and reversed by him as to the contention against him, writs of error from the Supreme Court to review each judgment would not lie, because such judgment is not final so far as the jurisdiction of the Supreme Court is concerned. *Covington v. First Nat. Bank*, 185 U. S. 270, 46 L. ed. 906, 22 Sup. Ct. Rep. 645.

When the jurisdiction of the circuit court rests wholly upon a Federal question the Supreme Court alone would have ju-

jurisdiction of an appeal from the circuit court. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 279, 280, 45 L. ed. 860, 861, 21 Sup. Ct. Rep. 646; *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 428, 47 L. ed. 245, 23 Sup. Ct. Rep. 211; *Watkins v. King*, 55 C. C. A. 290, 118 Fed. 532; *Huguley v. Galetton Cotton Mills*, 184 U. S. 295, 46 L. ed. 548, 22 Sup. Ct. Rep. 452.

There are special statutes dealing with special subjects, and making the judgment of the circuit court of appeals final when called upon to review cases arising under such statutes. In all such cases no appeal to the Supreme Court will lie, nor a writ of error, but a revision, if any, must be by certiorari to the circuit court of appeals. For illustration, see bankruptcy act of 1898, sec. 25; U. S. Stat. at L. Vol. 30, p. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432, and see also an act concerning carriers in interstate commerce, 1898; U. S. Stat. at L. Vol. 30, p. 426, chap. 370, sec. 4 of act, U. S. Comp. Stat. 1901, p. 3208.

### *Petition for Appeal or Writ of Error.*

Title of case as appealed.

To the Hon....., Chief Justice, or to Any Associate Justice of the Supreme Court of the United States:

Now comes the (appellant) by his solicitor and complains that in the record and proceedings, and also in the rendition of the decree (or judgment) of the United States Circuit Court of Appeals for the.....circuit, sitting at....., in the State of....., in the above styled and numbered cause, on the.....day of....., A. D. 19...., affirming the decree of the United States Circuit Court for the.....district of..... in said cause, manifest error has intervened to the great damage of the petitioner; that the jurisdiction of the Circuit Court of the United States for the.....district of.....depended upon the fact (that the railroad company defendant was a corporation created by an act of Congress, or any other ground of jurisdiction other than where the jurisdiction of the Circuit Court of Appeals is made final); that the amount involved therein and the matter in controversy exceeds the sum of one thousand dollars besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

Wherefore petitioner prays for an allowance of the appeal to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for a supersedeas of said judgment and such other process as is required to perfect the appeal prayed for, to the end that the error therein may be corrected.

R. F.,  
Solicitor.



Appeal and supersedeas allowed, and bond fixed in the sum of..... dollars, conditioned as the law directs, this the.....day of..... A. D. 19...

Associate Justice Supreme Court, etc.

The appeal may be allowed by any of the justices of the Supreme Court or any of the judges of the court of appeals.

### *Assignment of Errors.*

With this petition should be filed an assignment of errors, in form as before given.

When the appeal is allowed the clerk of the Supreme Court issues the writ, and the petition and assignment of errors and bond, when approved, are filed with the clerk of the circuit court of appeals. Notice of appeal is issued and the clerk incorporates certified copies of these proceedings with the record and proceedings in the cause before the circuit court of appeals, duly certifies the transcript, and forwards to the clerk of the Supreme Court of the United States.

Forms given heretofore for the proceedings in appeals from the circuit court to the circuit court of appeals may be used, the difference being as to time within which the appeal is taken being *one year* from the circuit court of appeals to the Supreme Court.

An appeal from the circuit court of appeals to the Supreme Court in cases of bankruptcy is provided for in sec. 252, New Code, effective January 1st, 1912, allowing or rejecting a claim under the bankrupt laws where the amount in controversy exceeds the sum of two thousand dollars, or when some justice of the Supreme Court shall certify that the question involved allowing or rejecting the claim is essential to a uniform construction of the bankrupt law. So any final judgment of the court of appeals of the District of Columbia may be revised by the Supreme Court upon writ of error or appeal. New Code, chap. 10, sec. 250.

S. Eq.—49.

## CHAPTER CXIX.

### APPEAL FROM STATE COURTS TO THE UNITED STATES SUPREME COURT.

I discussed incidentally, under "Federal Questions," appeals from the highest State court to the Supreme Court of the United States. We saw in chapter 27, that by U. S. Rev. Stat. sec. 709, U. S. Comp. Stat. 1901, p. 575, a *final* judgment or decree in any suit in the highest court of a State wherein is drawn in question the validity of a statute or treaty, or authority exercised under the United States, and the decision is *against* their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution of the United States, its treaties, or laws, and the decision is in *favor of their validity*; or when any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the *title, right, privilege, or immunity* specially set up or claimed by either party under such treaty, statute, commission, or authority,—may be re-examined and reversed or affirmed in the Supreme Court upon *writ of error* (see sec. 709, chapter 27). *Mutual L. Ins. Co. v. McGraw*, 188 U. S. 291, 47 L. ed. 480, 23 L.R.A. 33, 23 Sup. Ct. Rep. 375; *Western U. Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *Keerl v. Montana*, 213 U. S. 135, 53 L. ed. 734, 29 Sup. Ct. Rep. 469; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692; *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 789; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 492, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194. U. S. Rev. Stat. art. 709, is embodied in sec. 237 of the New Code, chap. 10.

By U. S. Rev. Stat. sec. 1003, U. S. Comp. Stat. 1901, p.

713, it is provided that writs of error from the Supreme Court to the State court shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered in a United States court.

By section 5 of the appellate court act of 1891, the appellate jurisdiction of the Supreme Court over State courts of last resort involving a Federal question is not affected by that act; and the statutes governing the exercise of that jurisdiction are sections 709, 710, 1003 of the United States Revised Statutes, and sections 997 to 1013 of the United States Revised Statutes governing proceedings on error and appeal.

Having thus referred to the statutes by which writs of error from the Supreme Court to State courts are controlled, I will, before giving the necessary forms and substance of the statutes governing practice in such cases, state certain rules which have been settled by the cases, and which control the Supreme Court in granting the writs of error to State courts. It will be seen by these rules that the object of this jurisdiction is solely to restrain unconstitutional legislation, and not to correct errors. *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Remington Paper Co. v. Watson*, 173 U. S. 451, 43 L. ed. 764, 19 Sup. Ct. Rep. 456.

First. It need not be the decision of the *Supreme Court* of a State, but it will grant a writ of error to any court of last resort in the State having jurisdiction to determine the case. Thus, if by a State statute any inferior court is authorized to finally determine the case, a writ of error will be issued to that court; or when the highest State tribunal refuses to review a case from an inferior court the writ of error will be directed to the inferior court. *Bacon v. Texas*, 163 U. S. 215, 41 L. ed. 135, 16 Sup. Ct. Rep. 1023; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215.

Second. In order to sustain the jurisdiction of the Federal Supreme Court, it must appear:

(a) That a Federal question is presented, and it is apparent from the record. *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 492, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; *Michigan Sugar Co. v. Michigan* (*Michigan Sugar Co. v. Dix*) 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *San Jose Land*

& Water Co. v. San Jose Ranch Co. 189 U. S. 180, 47 L. ed. 768, 23 Sup. Ct. Rep. 487; Fowler v. Lamson, 164 U. S. 255, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221; Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; Kipley v. Illinois, 170 U. S. 186, 42 L. ed. 1001, 18 Sup. Ct. Rep. 550; Turner v. Richardson, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; Scudder v. Comptroller (Scudder v. Coler), 175 U. S. 36, 44 L. ed. 63, 20 Sup. Ct. Rep. 26; Green Bay & M. Canal Co. v. Patten Paper Co. 172 U. S. 68, 43 L. ed. 368, 19 Sup. Ct. Rep. 97; Zadig v. Baldwin, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; Levy v. Superior Ct. 167 U. S. 177, 42 L. ed. 126, 17 Sup. Ct. Rep. 769. It cannot be supplied by an assignment of errors. Chapin v. Fye, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

(b) That a decision was made thereon, or that such a question must have arisen and been necessarily involved (*Ibid.*; Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co. 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247, and cases cited; Connecticut ex rel. New York & N. E. R. Co. v. Woodruff, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; Powell v. Brunswick County, 150 U. S. 433-440, 37 L. ed. 1134-1137, 14 Sup. Ct. Rep. 166; Fowler v. Lamson, 164 U. S. 255, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; McQuade v. Trenton, 172 U. S. 639-640, 43 L. ed. 582, 19 Sup. Ct. Rep. 292; Sayward v. Denny, 158 U. S. 184, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; Castillo v. McConnico, 168 U. S. 679, 42 L. ed. 624, 18 Sup. Ct. Rep. 229; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 48, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; Allen v. Southern P. R. Co. 173 U. S. 489, 43 L. ed. 778, 19 Sup. Ct. Rep. 518; Schlemmer v. Buffalo R. & P. R. Co. 205 U. S. 1, 2, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243; see Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 67, 46 L. ed. 86, 87, 22 Sup. Ct. Rep. 26), in the case, and the decision as made comes within the provisions of the United States Revised Statutes, sec. 709, U. S. Comp. Stat. 1901, p. 575 (*Northern P. R. Co. v. Ellis*, 144 U. S. 464, 36 L. ed. 506, 12 Sup. Ct.

Rep. 724; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 41; *Powell v. Brunswick County*, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; *Rogers v. Jones*, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635). The decision must be against the Federal question. *Baker v. Baldwin*, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19; *Kizer v. Texarkana & Ft. S. R. Co.* 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 193, 53 L. ed. 964, 29 Sup. Ct. Rep. 546; *Eustis v. Bolles*, 150 U. S. 361-366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131. However, when the case arises under the third section of U. S. Rev. Stat. sec. 709, where a right, title, privilege, or immunity is claimed, there can be no inference from the case that it was involved; it must be specifically set up and must be claimed by the plaintiff in error, and not a third person. *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; *Braxton County Ct. v. West Virginia*, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275; *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 658, 41 L. ed. 1152, 17 Sup. Ct. Rep. 709; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 14, 45 L. ed. 404, 21 Sup. Ct. Rep. 240 *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247; *Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 193, 53 L. ed. 964, 29 Sup. Ct. Rep. 546.

(c) A bare averment of a Federal question is not sufficient. *Goodrich v. Ferris*, 214 U. S. 71, 53 L. ed. 914, 29 Sup. Ct. Rep. 580; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 87, 35 L. ed. 946, 12 Sup. Ct. Rep. 142; *St. Louis, G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 483, 39 L. ed. 504, 15 Sup. Ct. Rep. 443; *Clarke v. McDade*, 165 U. S. 173, 41 L. ed. 674, 17 Sup. Ct. Rep. 284; *St. Paul, M. & M. R. Co. v. St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 11; *Fayerweather v. Ritch*, 195 U. S. 299, 49 L. ed. 210, 25 Sup. Ct. Rep. 58; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633; *New York C. & H. R. R. Co. v. New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

(d) It must be a real, not fictitious, Federal question. *Hamblin v. Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Wilson v. North Carolina*, 169 U. S. 595, 42 L. ed. 871, 18 Sup. Ct. Rep. 435; *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 182; *Farrell v. O'Brien (O'Callaghan v. O'Brien)*, 199 U. S. 100, 50 L. ed. 107, 25 Sup. Ct. Rep. 727; *Swing v. Weston Lumber Co.* 205 U. S. 275, 51 L. ed. 799, 27 Sup. Ct. Rep. 497; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

Third. It must appear that, though the Federal question was raised, the decision was not, or could not have been, made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the Federal question. *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Connecticut ex rel. New York & N. E. R. Co. v. Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976; *Rogers v. Jones*, 214 U. S. 196, 53 L. ed. 965, 29 Sup. Ct. Rep. 635; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Bacon v. Texas*, 163 U. S. 227, 41 L. ed. 139, 16 Sup. Ct. Rep. 1023; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 576, 40 L. ed. 540, 16 Sup. Ct. Rep. 389; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Delaware City S. & P. S. B. Nav. Co. v. Reybold*, 142 U. S. 643, 35 L. ed. 1144, 12 Sup. Ct. Rep. 290; *O'Neil v. Vermont*, 144 U. S. 336, 36 L. ed. 457, 12 Sup. Ct. Rep. 693; *New York C. & H. R. R. Co. v. New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Fourth. When it appears the State decision was correct, regardless of the Federal question, jurisdiction will not attach. *Hammond v. Johnston*, 142 U. S. 78, 35 L. ed. 942, 12 Sup. Ct. Rep. 141.

Fifth. The Federal question must be raised in the original pleadings and not in the proceedings after the State court's judgment (*Chesapeake & O. R. Co. v. McDonald*, 214 U. S. 191, 53 L. ed. 963, 29 Sup. Ct. Rep. 546; *McCorquodale v. Texas*, 211 U. S. 432, 53 L. ed. 269, 29 Sup. Ct. Rep. 146; *Meyer v. Richmond*, 172 U. S. 92, 43 L. ed. 377, 19 Sup. Ct. Rep. 106; *Loeber v. Schroeder*, 149 U. S. 585, 37 L. ed. 859, 13 Sup. Ct. Rep. 934; *Turner v. Richardson*, 180 U. S. 87,

45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Zadig v. Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 848, 22 Sup. Ct. Rep. 605; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Miller v. Cornwall R. Co.* 168 U. S. 133, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Sayward v. Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Burt v. Smith*, 203 U. S. 129, 51 L. ed. 121, 27 Sup. Ct. Rep. 37; *Osborne v. Clark*, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319; *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176), and by plaintiff or defendant. But since the rule of the Supreme Court was promulgated requiring opinions of the court below to be sent up with the record, it is held sufficient to give jurisdiction if the Federal question is fully considered in the opinion of the State court and ruled against the plaintiff in error. *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 179, 180, 47 L. ed. 766, 768, 23 Sup. Ct. Rep. 487; *Dibble v. Bellingham Bay Land Co.* 163 U. S. 69, 41 L. ed. 74, 16 Sup. Ct. Rep. 939; *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34; *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 127, 48 L. ed. 376, 24 Sup. Ct. Rep. 221. Thus, it is said that, though a Federal right is not set up in the original petition or earlier proceedings, yet if it clearly appear from the opinion of the State court that a Federal question was in issue and was actually decided against the Federal claim, and such decision was essential to the judgment, then the Supreme Court would re-examine the case. *Ibid.*; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487.

In *Weber v. Rogan*, 188 U. S. 14, 47 L. ed. 365, 23 Sup. Ct. Rep. 263, it is decided that a Federal question is raised too

late where it is first suggested in an application for a rehearing, citing *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Eastern Bldg. & L. Assn. v. Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *McCorquodale v. Texas*, 211 U. S. 437, 53 L. ed. 271, 29 Sup. Ct. Rep. 146; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438; *Forbes v. State Council*, 216 U. S. 396, 54 L. ed. 534, 30 Sup. Ct. Rep. 295.

But in *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241, it was held that a Federal question raised by an application for rehearing is not too late when that court proceeds to discuss the Federal question in denying the application. *McCorquodale v. Texas*, 211 U. S. 437, 53 L. ed. 269, 29 Sup. Ct. Rep. 146, and cases cited. *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *McKay v. Kalyton*, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215.

And in *Rothschild v. Knight*, 184 U. S. 339, 46 L. ed. 579, 22 Sup. Ct. Rep. 391, it is said that where the Federal question was raised on writ of error to the supreme court of the State, it would be sufficient, citing several cases (*Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 193, 50 L. ed. 149, 26 Sup. Ct. Rep. 41; see *Mallors v. Commercial Loan & T. Co.* 216 U. S. 613, 54 L. ed. 638, 30 Sup. Ct. Rep. 438); but not where raised for the first time in a petition for rehearing to the State supreme court (*Kansas City Star Co. v. Julian*, 215 U. S. 589, 54 L. ed. 340, 30 Sup. Ct. Rep. 406).

Sixth. It must appear that the Federal question was presented, distinctly ruled upon, and denied. *Fowler v. Lamson*, 164 U. S. 255, 41 L. ed. 425, 17 Sup. Ct. Rep. 112; *Western U. Teleg. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; *Eustis v. Bolles*, 150 U. S. 362, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *Powell*



v. Brunswick County, 150 U. S. 439, 440, 37 L. ed. 1136, 1137, 14 Sup. Ct. Rep. 166; Harrison v. Morton, 171 U. S. 47, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; Michigan Sugar Co. v. Michigan (Michigan Sugar Co. v. Dix), 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581. And the fact that the State court declared no Federal question exists does not affect the right to a writ of error. Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446. Where the State court declines to pass on the Federal question, the issue is not so raised as to give the Supreme Court jurisdiction (Erie R. Co. v. Purdy, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 11, 51 L. ed. 685, 27 Sup. Ct. Rep. 407), when it is not set up in the original pleadings; but if set up in the pleadings, then the refusal of the court to pass upon it would not oust the jurisdiction, where there was a fair ground for asserting the Federal question (New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691).

Illustrative cases: Yates v. Jones Nat. Bank, 206 U. S. 167, 51 L. ed. 1009, 27 Sup. Ct. Rep. 638, and cases cited; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396; Western Turf Asso. v. Greenberg, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384; St. Louis I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; Jacobs v. Marks, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 67, 46 L. ed. 87, 22 Sup. Ct. Rep. 26; Tullock v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; Talbot v. First Nat. Bank, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; Williams v. First Nat. Bank, 216 U. S. 582, 54 L. ed. 625, 30 Sup. Ct. Rep. 441, held to involve a Federal question supporting the writ of error and California Powder Works v. Davis,

151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Chadwick v. Kelley*, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; *Avery v. Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94; *Hooker v. Los Angeles*, 188 U. S. 314, 47 L. ed. 487, 63 L.R.A. 471, 23 Sup. Ct. Rep. 395; *Iowa v. Rood*, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49; *Mobile Transp. Co. v. Mobile*, 187 U. S. 480, 47 L. ed. 267, 23 Sup. Ct. Rep. 170; *Johnson v. New York L. Ins. Co.* 187 U. S. 492, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Layton v. Missouri*, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; *Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650; *Delmar Jockey Club v. Missouri*, 210 U. S. 324, 52 L. ed. 1080, 28 Sup. Ct. Rep. 732; *Elder v. Wood*, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; *Vandalia R. Co. v. Indiana*, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; *Elder v. Colorado*, 204 U. S. 85, 51 L. ed. 381, 27 Sup. Ct. Rep. 223; *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; *Stone v. Southern Illinois & M. Bridge Co.* 206 U. S. 267, 51 L. ed. 1057, 27 Sup. Ct. Rep. 615; *Smith v. Jennings*, 206 U. S. 276, 51 L. ed. 1061, 27 Sup. Ct. Rep. 610; *Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74; *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543; *Williams v. First Nat. Bank*, 216 U. S. 582, 54 L. ed. 625, 30 Sup. Ct. Rep. 441,—held not to present a Federal question.

The alleged error of a State court in not following the law of another State raises no Federal question. *Terry v. Davy*, 46 C. C. A. 141, 107 Fed. 50; see *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194.

Seventh. A writ of error goes only to a *final* judgment of the State court (*McKnight v. James*, 155 U. S. 687, 39 L. ed. 311, 15 Sup. Ct. Rep. 248; *Great Western Teleg. Co. v. Burnham*, 162 U. S. 341, 40 L. ed. 992, 16 Sup. Ct. Rep. 850); not orders of a judge in chambers (*Lambert v. Barrett*, 157 U.

S. 700, 39 L. ed. 866, 15 Sup. Ct. Rep. 722; *Ex parte Jacobi*, 104 Fed. 681).

#### PROCEDURE.

##### *Time Within Which to Sue Out Writ.*

By U. S. Rev. Stat. sec. 1008, U. S. Comp. Stat. 1901, p. 715, a writ of error must be sued out within two years after the judgment of the State court, except when the party is under disability of infancy, insanity, or imprisonment, then two years from the removal of the disability.

##### *Amount Involved.*

Where a decision of a State court involves any of the questions indicated in section 709 of the United States Revised Statutes, U. S. Comp. Stat. 1901, p. 575, as given above, the Supreme Court may revise by writ of error the decision of the State court of last resort, without any reference to the amount involved. *The Habana*, 175 U. S. 683, 684, 44 L. ed. 322, 323, 20 Sup. Ct. Rep. 290. It is the Federal question that gives jurisdiction under section 709, and not the value of the subject-matter; and here I will call your attention to amount and value as an element in the appellate jurisdiction of the Supreme Court, and the changes that have been made in the history of that court as to amount as a controlling factor in its jurisdiction. *Kirby v. American Soda Fountain Co.* 194 U. S. 144, 48 L. ed. 912, 24 Sup. Ct. Rep. 619.

##### *Effect of Amount on Appellate Jurisdiction of the Supreme Court.*

For a century after the organization of the government the judiciary acts imposed pecuniary limits on appellate jurisdiction. *The Habana*, 175 U. S. 680, 44 L. ed. 321, 20 Sup. Ct. Rep. 290. For a long time it was fixed at two thousand dollars, and in 1875 it was raised to five thousand dollars. In 1889 it was provided (25 Stat. at L. p. 693, chap. 236), that when the judgment or decree did not exceed five thousand dollars the Supreme Court would have appellate jurisdiction on an issue of jurisdiction in the circuit court of the United

States, and upon that issue only; but if the amount of the decree exceeded five thousand dollars, then the Supreme Court could decide all the issues in the case on the merits. *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912; *Tupper v. Wise*, 110 U. S. 398, 28 L. ed. 189, 4 Sup. Ct. Rep. 26; *Gibson v. Shufeldt*, 122 U. S. 38, 30 L. ed. 1087, 7 Sup. Ct. Rep. 1066.

Thus stood the law until 1891, when it was changed by the act of March 3d of that year. This act created a new and complete scheme of appellate jurisdiction (see 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), and under this act the appellate jurisdiction of the Supreme Court was made to rest rather on the nature of the case than on the amount involved.

As the appellate jurisdiction of the Supreme Court now stands, you may appeal from the circuit courts of the United States on a question of jurisdiction direct to the Supreme Court without reference to amount. *The Habana*, 175 U. S. 682, 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290; *Kirby v. American Soda Fountain Co.*, 194 U. S. 144, 48 L. ed. 912, 24 Sup. Ct. Rep. 619.

In *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118, the repealing clause of the act of 1891 was held to remove any question of amount as affecting jurisdiction, and sections 692 and 695 of the United States Revised Statutes were held repealed by implication.

In appeals by writ of error from the Supreme Court of the United States to the State court of last resort, no amount is required to give jurisdiction under section 709 of the United States Revised Statutes authorizing the writ to issue. *The Habana*, 175 U. S. 683, 44 L. ed. 322, 20 Sup. Ct. Rep. 290.

In appeals from the circuit court of appeals to the Supreme Court of the United States the act of 1891 imposes a pecuniary limit of one thousand dollars in all cases not made final in the circuit court of appeals; that is, in order to appeal in this class of cases, the amount involved must exceed one thousand dollars besides costs. And if this should not appear in the record you may supply it by affidavits. (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 310, 41 L. ed. 1017, 17 Sup. Ct. Rep. 540; *Whiteside v. Haselton*, 110 U. S. 297, 28 L. ed. 153, 4 Sup. Ct. Rep. 1; *Rector v. Lipscomb*,

141 U. S. 557, 35 L. ed. 857, 12 Sup. Ct. Rep. 83), which may be rebutted by counter-affidavits (*Ibid.*); but in determining amount, if the judgment is against the plaintiff, the amount in good faith claimed should control, but if the judgment be against the defendant then the amount of the judgment must control (*Gorman v. Havird*, 141 U. S. 208, 35 L. ed. 718, 11 Sup. Ct. Rep. 943; *J. P. Jorgenson Co. v. Rapp*, 85 C. C. A. 364, 157 Fed. 738; *New Mexico v. Atchison, T. & S. F. R. Co.* 201 U. S. 41, 50 L. ed. 651, 26 Sup. Ct. Rep. 386), unless there be a counterclaim disallowed (*Buckstaff v. Russell & Co.* 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448).

In the bankrupt act of July 1, 1898, an appeal to the Supreme Court from the circuit court of appeals is allowed if the amount in controversy, in the allowance or rejection of a claim, exceeds two thousand dollars and a Federal question is involved; otherwise the judgment of the circuit court of appeals is final and the question can only be taken to the Supreme Court by certiorari. 30 Stat. at L. 553, chap. 541.

#### PRACTICE IN APPEALS.

##### *Practice.*

By U. S. Rev. Stat. sec. 1003, U. S. Comp. Stat. 1901, p. 713, writs of error from the Supreme Court to the State court of last resort are issued and prosecuted in the same manner and are to have the same effect as if the judgment or decree appealed from was rendered in the United States court. U. S. Rev. Stat. sec. 709, U. S. Comp. Stat. 1901, p. 575.

So, then, bearing in mind the conditions above stated, and this statute, you may prepare your petition for the writ of error as follows:

##### *Petition for Writ.*

A. B. }  
vs.    }  
C. D. } In Equity.

In the Supreme Court of the United  
States, ..... Term, .....  
A. D. 19...

To the Honorable....., Chief Justice of the Supreme Court of the  
United States, and the Associate Justices of said Court:  
Now comes A. B., plaintiff in the above cause, and would show unto this

Honorable Court that in the record and proceedings, and rendition of the decree in the above cause by the Supreme Court of the State of . . . . ., it being the highest court of said State in which a decision could be had on the said suit between A. B. and C. D., manifest error has occurred, greatly to his damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question (the validity of a statute, or a treaty, or an authority exercised under the United States, and the decision was against their validity), or (the validity of a statute or an authority exercised under said State on the ground of repugnancy to the constitution, laws or treaties of the United States, and the decision was in favor of the validity of the law of the State), or (there was drawn in question the construction of a clause of the constitution, or of a treaty, or statute or commission held under the United States, and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause, treaty, statute or commission) (the Federal question particularly involved in your case being specifically stated, then proceed); all of which is fully apparent in the record and proceedings of the case, and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that his appeal be allowed and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of said court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

R. F.,  
Solicitor.

*By Whom Citation Signed and Appeal Allowed.*

By section 999, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 712, it is provided that when a writ of error is issued to a State court the citation shall be signed by the chief justice, judge or chancellor of the State court in which judgment was rendered, or by a justice of the Supreme Court of the United States, and at least thirty days notice given. *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792; *Palmer v. Donner*, 7 Wall. 541, 19 L. ed. 99; *Twitchell v. Pennsylvania*, 7 Wall. 324, 19 L. ed. 223; *Haynor v. New York*, 170 U. S. 410, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631; *Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Butler v. Gage*, 138 U. S. 56, 34 L. ed. 871, 11 Sup. Ct. Rep. 235. It may be allowed by any of the judicial officers above named

(*Ibid.* *Gleason v. Florida*, 9 Wall. 779, 19 L. ed. 730; *Aldrich v. Ætna Ins. Co.* 8 Wall. 495, 19 L. ed. 475; *Ex parte Chadwick*, 159 Fed. 576; *Haynor v. New York*, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631), but only by those named. Thus where the Supreme Court of a State was composed of a chief justice and three associate justices, a writ allowed by an associate justice will be dismissed. It must be allowed by the chief justice (see authorities above; *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792; *Northwestern Union Packet Co. v. Home Ins. Co.* 154 U. S. 588, and 20 L. ed. 463, 14 Sup. Ct. Rep. 1168); but in the absence of the chief justice the presiding justice may act, it being shown that he was acting as chief justice (*Ibid.*; *Butler v. Gage*, 138 U. S. 56, 34 L. ed. 871, 11 Sup. Ct. Rep. 235; *Missouri Valley Land Co. v. Wiese*, 208 U. S. 234, 52 L. ed. 463, 28 Sup. Ct. Rep. 294).

So the judge, chancellor, or presiding judge of any inferior State court of last resort in the particular case may allow the writ and sign the citation.

The allowance is essential to the jurisdiction of the Supreme Court. *Gleason v. Florida*, 9 Wall. 783, 19 L. ed. 731; *Northwestern Union Packet Co. v. Home Ins. Co.* 154 U. S. 588, and 20 L. ed. 463, 14 Sup. Ct. Rep. 1168. It is not a matter of right. *Twitchell v. Pennsylvania*, 7 Wall. 324, 19 L. ed. 223.

The petition must be accompanied with an assignment of errors (see form of assignment), and when made to a justice of the Supreme Court of the United States it must be accompanied with a complete record from the State court, so that the justice to whom the application is made may ascertain whether a question cognizable on appeal was made and decided in the proper State court, and whether the face of the record will justify the allowance of the writ. *Ibid.*

### *Order of Allowance.*

Title as in bill.

Court where allowed.

On this the.....day of....., A. D. 19..., came on to be heard the application of A. B., plaintiff (or the defendant), said plaintiff being

represented by counsel, for a writ of error, and it appearing to the court from the petition filed herein, and the record filed therewith, that the application ought to be granted and that a transcript of the record and proceedings and papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition, that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff giving bond, conditioned as the law directs, in the sum of..... dollars (which may operate as a supersedeas; if so, add it), and that a true copy of the record, assignment of errors and all proceedings had in the case in the.....court of.....shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that the said court may inspect the same and do what according to law should be done.

However, a formal order is not necessary if the citation is signed, and the writ of error is indorsed, allowed as seen in form hereafter given.

The court upon the application may grant the writ of error, and if to the State supreme court from the Supreme Court of the United States, the following form may be used:

The President of the United States to the Honorable Judges of the Supreme Court of the State of....., or to the Presiding Judge or Chancellor of the.....Court of the State of....., etc.—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said court before you, or some of you, between (state parties), your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question (here state any of the grounds indicated in U. S. Rev. Stat., 907, authorizing the writ), and the decision was against the validity (or in favor of the validity), etc., and there being manifest error in said decision greatly to the damage of A. B., the petitioner in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the.....day of....., A. D. 19... in the Supreme Court to be then and there held, that the record may be inspected by said court and justice done.

Witness the Hon....., Chief Justice of the Supreme Court, the .....day of....., in the year of our Lord 19...

[SEAL.]

Clerk of the Supreme Court of the United States.

Allowed on....., giving bond according to law in the sum of .....dollars.

J. M.,  
Justice of the Supreme Court.



The same form may be used when granted by the chief justice of the State court or judge or chancellor finally deciding the case. The writ is a writ of the Supreme Court of the United States without reference to who issues it, and whoever allows it and issues the citation, but exercises an authority vested by Congress in him concurrently with each of the justices of the Supreme Court (*Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Havnor v. New York*, 170 U. S. 411, 42 L. ed. 1088, 18 Sup. Ct. Rep. 631; *Gleason v. Florida*, 9 Wall. 783, 19 L. ed. 731; *Bartemeyer v. Iowa*, 14 Wall. 28, 20 L. ed. 792), except that it is directed to the court of last resort deciding the case, instead of the Supreme Court of the State, and is signed by the clerk and endorsed by the judge of the court allowing it: "Allowed, M. F., judge, etc."

*Effect of the allowance and Certificate of a Judge or Chancellor of a State Court.*

While a chief justice, judge, or chancellor of a State court may allow the writ, yet certifying such allowance, and the grounds for it, cannot supply the want of evidence in the record that a Federal question which would authorize the writ under U. S. Rev. Stat. sec. 709, U. S. Comp. Stat. 1901, p. 575, did exist. *Felix v. Scharnweber*, 125 U. S. 59, 31 L. ed. 688, 8 Sup. Ct. Rep. 759; *Louisville & N. R. Co. v. Smith H. & Co.* 204 U. S. 551, 51 L. ed. 612, 27 Sup. Ct. Rep. 401; *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; *Allen v. Arguimban*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 63 L.R.A. 329, 23 Sup. Ct. Rep. 84; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 42, 45 L. ed. 415, 416, 21 Sup. Ct. Rep. 256.

The office of such certification is not to originate a Federal question, but to make it more specific and certain. *Ibid.*; *Parmelee v. Lawrence*, 11 Wall. 39, 20 L. ed. 49; *Newport Light Co. v. Newport*, 151 U. S. 537, 38 L. ed. 262, 14 Sup. Ct. Rep. 429; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 42, 45 L. ed. 415, 416, 21 Sup. Ct. Rep. 256.

U. S. 48, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; *Hulbert v. Chicago*, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617.

The Supreme Court must determine for itself from the record whether a Federal question is involved (*Powell v. Brunswick County*, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166; *Newport Light Co. v. Newport*, 151 U. S. 537, 38 L. ed. 262, 14 Sup. Ct. Rep. 429; *Moore v. Mississippi*, 21 Wall. 638, 639, 22 L. ed. 653, 654; *Walker v. Villavaso*, 6 Wall. 128, 18 L. ed. 854), and the writ of error must be dismissed if no Federal question appears. *Onondaga Nation v. Thacher*, 189 U. S. 309-311, 47 L. ed. 827, 828, 23 Sup. Ct. Rep. 636.

### *Citation.*

By U. S. Rev. Stat. sec. 999, U. S. Comp. Stat. 1901, p. 712, when the writ is allowed a citation shall be signed by the justice or judge granting the writ, *Insurance Co. v. Mordecai*, 21 How. 195, 202, citing 16 L. ed. 94-96, and admonishing the defendant in error to be and appear before the Supreme Court of the United States to be holden at the city of Washington, D. C., on the ..... day of ..... A. D. 19...., next (See Supreme Court rule 8, sec. 5, as when to be made returnable), pursuant to a writ of error filed in the office of the (court in which filed) wherein A. B. was plaintiff and you were defendant, that you may answer why the judgment rendered against A. B., the plaintiff in error, may not be revised and justice done in the premises. It is issued in the name of the President of the United States to the defendant in error, and tested in the name of the Chief Justice of the Supreme Court of the United States, and signed *by the judge allowing the writ of error.*

The service of the citation is necessary to give jurisdiction, unless waived, or a general appearance entered by the defendant in error (*Dayton v. Lash*, 94 U. S. 112, 24 L. ed. 33; *Kitchen v. Randolph*, 93 U. S. 87, 23 L. ed. 810; *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* 19 C. C. A. 477, 34 U. S. App. 626, 73 Fed. 316, 317; *Freeman v. Clay*, 1 C. C. A. 115, 2 U. S. App. 151, 48 Fed. 849; *Villabolas v. United States*, 6 How. 90, 12 L. ed. 356); but service on the

attorney of record is sufficient (*Bigler v. Waller*, 12 Wall. 147, 20 L. ed. 261; *United States v. Curry*, 6 How. 111, 12 L. ed. 365; *Scruggs v. Memphis & C. R. Co.* 131 U. S. civ, and 26 L. ed. 741).

The defendant in error must have thirty days' notice before the first day of the term to which the writ is returnable, or he cannot be compelled to go to a hearing, and the case can only be taken up by consent during that term. *Welsh v. Mandeville*, 5 Cranch, 321, 3 L. ed. 113; *National Bank v. National Bank*, 99 U. S. 609, 25 L. ed. 362.

### *Bond.*

But by U. S. Rev. Stat. sec. 1000, U. S. Comp. Stat. 1901, p. 712, every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error or appeal shall prosecute his writ or appeal to effect, and if he fail to make good his plea shall answer all damages and costs (when writ is to be supersedeas) or all costs (when not to act as supersedeas). This bond is to be approved by the judge granting the writ. See form of appeal bond and approval.

### *When Writ of Error a Supersedeas.*

By U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714, it is provided that in any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error by *lodging* a copy in the clerk's office, where the record remains, within sixty days (Sundays excepted) after the rendering of the judgment complained of, and giving the security required by law on the *issuing of citation*. *Danville v. Brown*, 128 U. S. 504, 32 L. ed. 508, 9 Sup. Ct. Rep. 149; *Danielson v. Northwestern Fuel Co.* 55 Fed. 50.

But if he desires to stay process, he may, having lodged a copy of the writ of error with the clerk as aforesaid, give the security required by law at any time within sixty days after the rendition of such judgment, or even after sixty days, upon application to a justice or judge of the appellate court for a supersedeas.

In such cases, where a writ of error may be a supersedeas, execution shall not issue until the expiration of ten days. Therefore, to make a writ of error operate as a supersedeas, it must not only be issued and served, but a copy must be lodged with the clerk for the adverse party, in the office where the *record remains*. *Kitchen v. Randolph*, 93 U. S. 87, 88, 23 L. ed. 810, 811; *Foster v. Kansas*, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 897; *Jabine v. Oates*, 115 Fed. 864; *Sage v. Central R. Co.* 93 U. S. 417, 23 L. ed. 935; *Baltimore & O. R. Co. v. Harris*, 7 Wall. 574, 19 L. ed. 100; *O'Dowd v. Russell*, 14 Wall. 405, 20 L. ed. 858 (See chapter 110.)

By the original act of 1789 this was required to be done in *ten* days after rendering judgment and passing the decree complained of, but by act of June, 1872, corrected by act of February 17, 1875, sixty days was allowed. *Boise County v. Gorman*, 19 Wall. 661, 22 L. ed. 226.

You will notice in the latter clause of the act, that in cases where a writ of error may be a supersedeas, that execution shall not issue until ten days expires. *Foster v. Kansas*, *supra*. This means that while you have sixty days within which to obtain a supersedeas, yet after ten days from the rendition of the judgment execution can issue if the supersedeas has not been fixed within the ten days. *Boise County v. Gorman*, *supra*.

The supersedeas when issued will stay further proceedings, but not interfere with executions issued after ten days and before the supersedeas is sued out. *Ibid.*; *Doyle v. Wisconsin*, 94 U. S. 50, 24 L. ed. 64.

### *Time.*

In calculating lapse of time you calculate from the entry of the judgment or decree, not when signed by the judge. *Boise County v. Gorman*, 19 Wall. 665, 22 L. ed. 227; *Providence Rubber Co. v. Goodyear*, 6 Wall. 156, 18 L. ed. 763.

In *Green v. Van Buskirk*, 3 Wall. 448, 18 L. ed. 245, it was held that when judgment is given in a Supreme Court of a State, and the record is returned to an inferior court with an order to enter a judgment there, time affecting the supersedeas runs from the entry of the judgment in the inferior court.

*After Sixty Days Cannot Obtain Supersedeas.*

Unless a writ of error is sued out or an appeal perfected in sixty days after the entry of a judgment, there is no power in a justice of the appellate court to grant a supersedeas (Logan v. Goodwin, 41 C. C. A. 573, 101 Fed. 654; Kitchen v. Randolph, 93 U. S. 86, 23 L. ed. 810; Brown v. Evans, 18 Fed. 56); Western U. Teleg. Co. v. Eyser, 19 Wall. 428, 22 L. ed. 44; Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 935; Texas & P. R. Co. v. Murphy, 111 U. S. 490, 28 L. ed. 493, 4 Sup. Ct. Rep. 497; Peugh v. Davis, 110 U. S. 229, 28 L. ed. 128, 4 Sup. Ct. Rep. 17; Wurts v. Hoagland, 105 U. S. 702, 26 L. ed. 1110; New England R. Co. v. Hyde, 41 C. C. A. 404, 101 Fed. 397; U. S. Rev. Stat. sec. 1007, U. S. Comp. Stat. 1901, p. 714; see Foster v. Kansas, 112 U. S. 204, 28 L. ed. 630, 5 Sup. Ct. Rep. 897); and after citation is signed and security approved the judge of the court below has no jurisdiction to grant it (Draper v. Davis, 102 U. S. 371, 26 L. ed. 122; Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 32 Fed. 530); but it seems if the delay was occasioned by the court, and not the fault of the parties, and injustice would be done, a *nunc pro tunc* order can be entered (Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933).

*Act Must Be Followed.*

A supersedeas is not obtained by virtue of any process issuing from the court, but it follows as matter of law by complying with the act of Congress. Goddard v. Ordway, 94 U. S. 673, 24 L. ed. 238; Slaughter-house cases, 10 Wall. 291, 19 L. ed. 920. It is indispensable that the requirements of the acts of Congress be fulfilled. Jabine v. Oates, 115 Fed. 864; Baltimore & O. R. Co. v. Harris, 7 Wall. 574, 19 L. ed. 100; O'Dowd v. Russell, 14 Wall. 405, 20 L. ed. 858; Sage v. Central R. Co. 93 U. S. 417, 23 L. ed. 935.

Note that the authorities above given were decided under the original act of 1789 and before 1872, when the amended act extended the time to sixty days for suing out a supersedeas, but the necessity for strictly pursuing the statute decided by these cases applies to the act of 1872.

*When Supersedeas Bond Becomes Impaired.*

When the security of a supersedeas bond becomes impaired, the Supreme Court may so adjudge it and order additional security. *Williams v. Claffin*, 103 U. S. 753, 754, 26 L. ed. 606, 607; *Jerome v. McCarter*, 21 Wall. 31, 22 L. ed. 516.

## CHAPTER CXX.

### MANDATE.

The appellate court may affirm, modify, or reverse any decree or order lawfully brought before it for review, or may direct such judgment to be rendered or such further proceedings to be had by the inferior court as the justice of the case may require. Sec. 10, act 1891, U. S. Comp. Stat. 1901, p. 552; *Southern Bldg. & L. Asso. v. Carey*, U. S. Rev. Stat. 701, U. S. Comp. Stat. 1901, p. 571; U. S. Rev. Stat. 709, U. S. Comp. Stat. 1901, p. 575; 117 Fed. 328.

#### *How Issued.*

The clerk of the appellate court issues the mandate according to the order or decree of the appellate court, and certifies it to the lower court. C. C. A. rule 32 (See Rule of Your Circuit; Rule of Supreme Court.)

#### *When Issued.*

By Supreme Court rule 24, sec. 5, in dismissal of any suit the clerk is to issue a mandate or other proper process to the court below for its information, and to proceed as required.

By Supreme Court rule 39, 159 U. S. 709, mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless time enlarged by order of the court or a justice thereof in vacation.

Circuit court of appeals rule 32 requires a mandate or other proper process to be issued on the order of the court in order to inform the court below of the proceedings had, and that further proceedings may be had in the court below as to law and justice may appertain (See Rule of Your Circuit.)

*Executing It.*

The mandate is the guide in executing the judgment, and the lower court must follow it and carry the decree into effect. *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 328; *Durant v. Essex Co.* (*Durant v. Storrow*), 101 U. S. 555, 25 L. ed. 961; *West v. Brashear*, 14 Pet. 54, 10 L. ed. 351; *Ex parte Dubuque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; *Great Northern R. Co. v. Western U. Teleg. Co.* 98 C. C. A. 193, 174 Fed. 321; see *Illinois v. Illinois C. R. Co.* 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 300; *Re Washington & G. R. Co.* 140 U. S. 92, 35 L. ed. 340, 11 Sup. Ct. Rep. 673; see *Ex parte First Nat. Bank*, 207 U. S. 66, 52 L. ed. 106, 28 Sup. Ct. Rep. 23. The lower court has nothing to do but execute the mandate. *Ibid.*; *Perkins v. Fourniquet*, 14 How. 330, 14 L. ed. 442; *Aspen Min. & Smelting Co. v. Billings*, 150 U. S. 37, 37 L. ed. 988, 14 Sup. Ct. Rep. 4; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 549; *Re Sanford Fork & Tool Co.* 160 U. S. 255, 40 L. ed. 416, 16 Sup. Ct. Rep. 291; *Gaines v. Rugg*, 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611; *White v. Bruce*, 48 C. C. A. 400, 109 Fed. 364; *Chapman v. Yellow Poplar Lumber Co.* 32 C. C. A. 402, 61 U. S. App. 499, 89 Fed. 904. The lower court cannot vary it, or examine it for any purpose other than its execution, or give any or further relief, or review it for apparent error upon any matter decided on appeal, or intermeddle with it further than to settle so much as has been remanded. If in doing so it mistakes or misconceives the order of the appellate court, and does not give effect in full to the mandate, its action may be controlled by appeal or mandamus, as will be hereafter seen. *Ibid.*; *Southern Bldg. & L. Asso. v. Carey*, 117 Fed. 328; *Livingston v. Story*, 12 Pet. 343, 9 L. ed. 1110; *James v. Central Trust Co.* 47 C. C. A. 374, 108 Fed. 931, and cases cited; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545; *Great Northern R. Co. v. Western U. Teleg. Co.* 98 C. C. A. 193, 174 Fed. 323; *Ouray County v. Geer*, 47 C. C. A. 450, 108 Fed. 480; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638.



*Effect of Mandate.*

The issues in the case are closed, and the decision embodied in the mandate constitutes an adjudication of all questions of law and fact in the case before the court. *Ex parte Union S. B. Co.* 178 U. S. 319, 44 L. ed. 1084, 20 Sup. Ct. Rep. 944; *Mutual L. Ins. Co. v. Hill*, 193 U. S. 554, 48 L. ed. 791, 24 Sup. Ct. Rep. 538; *Messinger v. Anderson*, 96 C. C. A. 445, 171 Fed. 789, 790 and cases cited; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518; *Thompson v. Maxwell Land Grant & R. Co.* 168 U. S. 451-456, 42 L. ed. 539-542, 18 Sup. Ct. Rep. 121; *Illinois v. Illinois C. R. Co.* 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300; *Mutual Reserve Fund Life Assn. v. Beatty*, 35 C. C. A. 573, 93 Fed. 747; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 78 C. C. A. 33, 147 Fed. 897; *Orient Ins. Co. v. Leonard*, 57 C. C. A. 176, 120 Fed. 808; *Patillo v. Allen-West Commission Co.* 47 C. C. A. 637, 108 Fed. 723; *Illinois ex rel. Hunt v. Illinois C. R. Co.* 34 C. C. A. 138, 91 Fed. 955; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Re Potts*, 166 U. S. 267, 41 L. ed. 995, 17 Sup. Ct. Rep. 520. Where there is no direction to enter any specific decree, but there is only a simple reversal, the effect is to put the case in the same posture as if no decree had been entered, and amendments may be permitted enlarging the issues. *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Hawkins v. Cleveland, C. C. & St. L. R. Co.* 39 C. C. A. 538, 99 Fed. 322; See *Atlanta K. & N. R. Co. v. Hooper*, 44 C. C. A. 586, 105 Fed. 550; *Mutual L. Ins. Co. v. Hill*, 193 U. S. 553, 48 L. ed. 791, 24 Sup. Ct. Rep. 538. So the court below cannot grant a rehearing, or new trial, or permit a new defense or amendment to the answer, unless the right is reserved in the decree of the appellate court, or permission given on application to that court, where the case has been considered on its merits. *Re Potts*, 166 U. S. 267, 268, 41 L. ed. 995, 996, 17 Sup. Ct. Rep. 520; *Walker v. Brown*, 86 Fed. 364; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep.

291; *Sibbald v. United States*, 12 Pet. 488, 9 L. ed. 1167; *Re Gamewell Fire-Alarm Teleg. Co.* 20 C. C. A. 111, 33 U. S. App. 452, 73 Fed. 910; *Hawkins v. Cleveland C. C. & St. L. R. Co.* 39 C. C. A. 538, 99 Fed. 322; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.* 99 Fed. 176; *Ex parte Du-buque & P. R. Co.* 1 Wall. 69, 17 L. ed. 514; see *Smale v. Mitchell*, 143 U. S. 99, 36 L. ed. 90, 12 Sup. Ct. Rep. 353. Nor will an appellate court remand a bill to set up new grounds for relief. *Warner v. Godfrey*, 186 U. S. 377, 46 L. ed. 1208, 22 Sup. Ct. Rep. 852. A mandate ordering a new trial opens up the entire case; it assumes the same posture as if no decree had been entered, and amendments enlarging the issues and permitting further proof are admissible (*Potts v. Creager*, 71 Fed. 574; *Hawkins v. Cleveland, C. C. & St. L. R. Co.* 39 C. C. A. 538, 99 Fed. 324; Citing *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; see *Burnham v. North Chicago Street R. Co.* 32 C. C. A. 64, 60 U. S. App. 225, 88 Fed. 627), except upon issues made and distinctly decided (*Wayne County v. Kennicott*, 94 U. S. 499, 24 L. ed. 260; *Balch v. Haas*, 20 C. C. A. 151, 36 U. S. App. 693, 73 Fed. 976; *Chaffin v. Taylor*, 116 U. S. 567, 29 L. ed. 727, 6 Sup. Ct. Rep. 518.) So where a case has been considered at length on its merits, and been remanded for further proceedings, the defendant will not be permitted to amend his answer so as to deny a fact affirmatively passed upon and determined by the Appellate court. *Walker v. Brown*, 86 Fed. 364; *Hill v. Mutual L. Ins. Co.* 113 Fed. 44; *S. C.* 55 C. C. A. 536, 118 Fed. 708; *Brown v. Lanyon Zinc Co.* 102 C. C. A. 497, 179 Fed. 311, and cases cited. Or where it reserves a single question of fact left open to be determined, that question alone can be tried. *Ibid.*; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291; *Illinois ex rel. Hunt v. Illinois C. R. Co.* 34 C. C. A. 138, 91 Fed. 957; *S. C.* 184 U. S. 92, 46 L. ed. 447, 22 Sup. Ct. Rep. 300. So where a decree is affirmed, the lower court can only record the decree and proceed with its execution. *Durant v. Essex Co.* (*Durant v. Storrow*), 101 U. S. 555, 25 L. ed. 961; *Kimberly v. Arms*, 40 Fed. 551; *Re Washington & G. R. Co.* 140 U. S. 96, 35 L. ed. 341, 11 Sup. Ct. Rep. 673; *Mutual L. Ins. Co. v. Hill*, 55 C. C. A. 536, 118 Fed. 711.

The effect of the decrees and mandates of the circuit court of appeals is the same as that of the Supreme Court. *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545.

So in second appeals or error, only proceedings subsequent to mandate are carried up, and no inquiry is allowed into original judgment. *Tyler v. Magwire*, 17 Wall. 283, 284, 21 L. ed. 583, 584; *Wayne County v. Kennicott*, 94 U. S. 499, 24 L. ed. 260; *Souer v. De Bary*, 44 C. C. A. 484, 105 Fed. 293; *Texas & P. R. Co. v. Wilder*, 41 C. C. A. 305, 101 Fed. 198, 199, and cases cited.

### *Issuing Execution.*

The appellate court cannot issue execution; if necessary it may be provided for in the mandate. § 10, act 1891, 26 Stat. at L. 829, chap. 517, U. S. Comp. Stat. 1901, p. 552. The court below must execute the mandate. *Sibbald v. United States*, 12 Pet. 492, 9 L. ed. 1169; *Third Nat. Bank v. Gordon*, 53 Fed. 473; *Tyler v. Magwire*, 17 Wall. 283, 21 L. ed. 583. Where a State court refuses to carry mandate into effect, the Supreme Court may on appeal proceed to a final decision and award execution. *Tyler v. Magwire*, 17 Wall. 290, 21 L. ed. 585; *Stanley v. Schwalby*, 162 U. S. 281, 40 L. ed. 969, 16 Sup. Ct. Rep. 754.

### *Remedy if the Court Does Not Enforce the Mandate.*

It may be by appeal or mandamus.

### *When by Appeal.*

Where the court below errs in construing opinion, the remedy is by appeal. *James v. Central Trust Co.* 47 C. C. A. 374, 108 Fed. 931, and cases cited, but in *Perkins v. Tourniquet*, 14 How. 330, 14 L. ed. 442, it is said you may use either mandamus or appeal. *Re Blake*, 175 U. S. 117, 44 L. ed. 95, 20 Sup. Ct. Rep. 42; See *Re Westervelt*, 39 C. C. A. 350, 98 Fed. 912; *Tyler v. Magwire*, 17 Wall. 290, 21 L. ed. 585; See *Metcalf v. Watertown*, 16 C. C. A. 37, 34 U. S. App. 107, 68 Fed. 861.

*When by Mandamus.*

Where the mandate leaves nothing to the judgment or discretion of the court below, and full effect is not given to the mandate, a mandamus may be applied for. *Re Blake*, 175 U. S. 117, 44 L. ed. 95, 20 Sup. Ct. Rep. 42; *Perkins v. Tourniquet*, 14 How. 330, 14 L. ed. 442; *Re Washington & G. R. Co.* 140 U. S. 95, 35 L. ed. 341, 11 Sup. Ct. Rep. 673, and cases cited; *City Nat. Bank v. Hunter*, 152 U. S. 512, 38 L. ed. 534, 14 Sup. Ct. Rep. 675; *Re City Nat. Bank*, 153 U. S. 246, 38 L. ed. 705, 14 Sup. Ct. Rep. 804; *Gaines v. Rugg*, 148 U. S. 243, 37 L. ed. 437, 13 Sup. Ct. Rep. 611; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520; *Ex parte Sawyer*, 21 Wall. 235, 22 L. ed. 617; *Re Huguley Mfg. Co.* 184 U. S. 301, 46 L. ed. 551, 22 Sup. Ct. Rep. 455; *Re Sanford Fork & Tool Co.* 160 U. S. 247, 40 L. ed. 414, 16 Sup. Ct. Rep. 291.

In *Mason v. Pewabic Min. Co.* 153 U. S. 361, 38 L. ed. 745, 14 Sup. Ct. Rep. 847, it is said that where a mandate of the court has been misconstrued or disregarded, the proper remedy is by mandamus, but where the action of the lower court conforms to the mandate, there can be neither mandamus nor appeal. *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843; *United States v. New York Indians*, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464.

*Can Court Recall Mandate After Term.*

See *Phipps v. Sedgwick*, 131 U. S. cxxxix Appx., and 24 L. ed. 595; *Gardner v. Goodyear Dental Vulcanite Co.* 131 U. S. ciii Appx. and 21 L. ed. 141. See *Herold v. Kahn*, 90 C. C. A. 307, 163 Fed. 947, where mandate was recalled; also *Bank of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113. In *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561, 6 Sup. Ct. Rep. 278, the mandate was recalled for want of jurisdiction. In *Reynolds v. Manhattan Trust Co.* 48 C. C. A. 249, 109 Fed. 97 it is said the court has no power to recall a mandate after the term has expired. See, also, *Waskey v. Hammer*, 102 C. C. A. 629, 179 Fed. 273.

*Second Appeals.*

We have seen already that in second appeals no inquiry is allowed into the original judgment, and where the decision of the lower court is in accord with the mandate no appeal will be allowed. *United States v. New York*, 173 U. S. 464, 43 L. ed. 769, 19 Sup. Ct. Rep. 464; *Kingsbury v. Buckner*, 134 U. S. 650, 33 L. ed. 1047, 10 Sup. Ct. Rep. 638; *Mackall v. Richards*, 116 U. S. 45, 29 L. ed. 558, 6 Sup. Ct. Rep. 234; *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843. They apply when the mandate of the court has not properly executed (*The Lady Pike* [*Pearce v. Germania Ins. Co.*] 96 U. S. 461, 24 L. ed. 672), or when issues arise not settled by the mandate. (*Hinckley v. Morton*, 103 U. S. 764, 26 L. ed. 458). When allowed, they bring up only the proceedings subsequent to the mandate. *Tyler v. Magwire*, 17 Wall. 253, 21 L. ed. 576; *Clark v. Keith*, 106 U. S. 465, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *United States v. Camou*, 184 U. S. 572, 46 L. ed. 694, 22 Sup. Ct. Rep. 505; *Washington Bridge Co. v. Stewart*, 3 How. 413, 11 L. ed. 658; *Stoll v. Loving*, 120 Fed. 806, and cases cited; *Guarantee Co. of N. A. v. Phenix Ins. Co.* 59 C. C. A. 376, 124 Fed. 174; *Montgomery County v. Cochran*, 62 C. C. A. 70, 126 Fed. 456.

## CHAPTER CXXI.

### REMOVALS.

There have always been two ways of removing a cause from a State court to a Federal court—one, as we have before seen under U. S. Rev. Stat. sec. 709, U. S. Comp. Stat. 1901, p. 575, by a writ of error from the Supreme Court of the United States to the court of last resort of a State; the other, by petition and removal from a State court to a circuit court of the United States.

This last provision for removal to a circuit court of the United States was made by Congress in the judiciary act of 1789, section 12, U. S. Rev. Stat. sec. 639, clause 1, and this act continued in force until 1875. Under this act no removal from a circuit court to a State court, based on the fact of a Federal question could be made, but only when the jurisdiction rested upon diversity of citizenship, and it was not until 1875 that the fact that the case depended on a Federal question, that any removal from a State court to a circuit court of the United States was permitted.

By the second section of the act of 1875, any suit of a civil nature where the matter in dispute exceeded the sum or value of five hundred dollars arising under the Constitution or laws of the United States, or treaties made, or in which the suit depended on a diversity of citizenship, etc., *either* party could remove it into the circuit court of the United States; and, further, that when there was a separable controversy in a suit which could be wholly determined between citizens of different States, *either* one or more of the defendants, or plaintiffs so interested could remove the case from the State to the Federal court.

Thus stood the law until 1887, when Congress passed another jurisdictional and removal act, which was revised and corrected in 1888, and known as the act of 1887 and 1888, which is now in force.

The first section of the act has already been given and discussed in detail, and we saw the jurisdiction of the Federal courts was contracted by increasing the amount or value involved from five hundred to two thousand dollars, but the grounds of jurisdiction were not changed otherwise. *Foulk v. Gray*, 120 Fed. 159-161.

By section 2 of the act of 1888, providing for removals, it was provided that any suit of a civil nature, in law or equity, arising under the Constitution, or laws of the United States, or treaties made or to be made, or which shall be made under their authority (of which the circuit courts of the United States are given original jurisdiction by the preceding section), which may now be pending, or which may hereafter be brought in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the Local Prejudice." New Code, chap. 3, sec. 28.

Thus far it provides for any suit depending on a Federal question to be removed to a Federal circuit court by the defendant or defendants. It then proceeds: Any other suits of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by section 1 of the act, which are now pending or may hereafter be brought in a State court, may be removed into the circuit court of the United States by the *defendant* or *defendants* therein being *nonresidents* of the State.

Again, it retained the separable clause of the Act of 1875, with a change as follows: "And when in any suit mentioned in section 2 there shall be a controversy which is wholly between citizens of different States, and which can be fully determined between them, then either one or more of the defendants actually interested can remove the case." It is thus seen by the act of 1888 jurisdiction by removal has been greatly restricted.

First. The amount or value necessary to jurisdiction of the circuit courts of the United States was increased from five hundred dollars, exclusive of costs, to two thousand dollars, exclusive of interest and costs.

Second. Jurisdiction by removal under this act is limited to cases of which the circuit court of the United States is given original jurisdiction by section 1,—that is, to such suits as might have been instituted by the plaintiff in the United

States circuit court under the first section of the act. *Ex parte Wisner*, 203 U. S. 449-457, 51 L. ed. 264-267, 27 Sup. Ct. Rep. 150, and cases cited; *Yellow Aster Min. & Mill. Co. v. Crane Co.* 80 C. C. A. 566, 150 Fed. 580; *Blunt v. Southern R. Co.* 155 Fed. 499; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992 (See chapter 122).

Third. Instead of "either party," as in the act of 1875, having the right of removal, only the defendant, or defendants, under the act of 1888, can remove the case when the case depends on a Federal question, and in other cases only by defendant, or defendants, when *nonresidents* of the State in which the suit is brought. *Monroe v. Williamson*, 81 Fed. 988, 989 (See "Who Can Remove").

Fourth. In the clause providing for the removal of a separable controversy by *either party* interested therein, only the defendant or the defendants who are *nonresidents* of the State can remove the controversy to the United States circuit court (See "Who Can Remove," "When Controversy Separable").

See sec. 28, New Code, chap. 3, providing no case can be removed relating to the liability of common carriers to their employees, brought in a State court. Effective January 1st, 1912.

### *Local Influence.*

Under the same section (No. 2) of the act a provision is made for removal on the ground of local influence, and which provides that "where a suit is now pending or may hereafter be brought in a State court in which there is a controversy between a citizen of another State, *any* defendant being a citizen of another State may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to such circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or any other State court to which the defendant under the State laws may remove the same, because of such prejudices or local influence; provided, however, that if it should further appear that there are other defendants not affected by such prejudice



or local influence, and there can be a separation of the parties to the suit who are affected by this local influence without prejudice to those who are not affected, then the circuit court shall remand the cause as to such parties not affected by the local influence. *Crotts v. Southern R. Co.* 90 Fed. 2; *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. (See "Practice" under this section. See "Removal on Ground of Local Prejudice.") New Code, chap. 3, sec. 28.

S. Bq.—51.

## CHAPTER CXXII.

### PROCEEDINGS IN STATE COURTS.

#### *Time of Filing Petition.*

By section 3 of the act of 1888 it is provided that a petition must be filed in the State court asking for a removal of the suit to the United States circuit court (See "Motion to Remand;" *First Nat. Bank v. Prager*, 34 C. C. A. 51, 63 U. S. App. 703, 91 Fed. 689; *Wilson v. Giberson*, 124 Fed. 701), of the district in which the suit is brought; and requires the petition to be filed *at or before* the time when, by the law or practice of the State court, the petitioner is required to plead or answer to the suit (*Kansas City, Ft. S. & M. R. Co. v. Daugherty*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626; *Fox v. Southern R. Co.* 80 Fed. 945; *Heller v. Ilwaco Mill & Lumber Co.* 178 Fed. 112). The cause cannot be removed by consent; petition and bond must be filed within the time required; *First Nat. Bank v. Prager*, 34 C. C. A. 51, 63 U. S. App. 703, 91 Fed. 689.

The petition should be verified, but if no objection made on this ground, the removal would not be affected. *Porter v. Northern P. R. Co.* 161 Fed. 773; *Howard v. Gold Reefs*, 102 Fed. 657; see *Donovan v. Wells F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 367; *Canal & C. Streets R. Co. v. Hart*, 114 U. S. 660, 29 L. ed. 228, 5 Sup. Ct. Rep. 1127. All essential averments showing jurisdiction on removal must be set forth. *Gillespie v. Pocahontas Coal & Coke Co.* 162 Fed. 744; *Alexander Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839. Allegations not denied by the record are taken as true. *Atlanta K. & N. R. Co. v. Southern R. Co.* 82

C. C. A. 256, 153 Fed. 122, 11 A. & E. Ann. Cas. 766; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896. The record may be looked to, in aid of the allegations of the petition. *Gillespie v. Pocahontas Coal & Coke Co.* 162 Fed. 744; *Hadfield v. Northwestern Life Assur. Co.* 105 Fed. 530.

Section 29, chap. 3, New Code, embodying sec. 3 of the act of 1888, requires petition to be verified.

### *Bond.*

With the petition for removal must be filed a bond with good and sufficient security, conditioned to file a copy of the record of the case pending in the State court in the circuit court of the United States on the *first day* of the *next term* of said court, and to pay all costs that may be awarded by said circuit court should it hold that the case has been wrongfully removed. Sec. 1, act 1888; *Clark v. Guy*, 114 Fed. 783; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626, 628; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *Probst v. Cowen*, 91 Fed. 929, 930; *People's Bank v. Ætna Ins. Co.* 53 Fed. 161; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839. One good surety is sufficient. Removal Cases, 100 U. S. 472, 25 L. ed. 599. It is not necessary for the removing party to sign. *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 291. A seal is not necessary. *Loop v. Winters*, 115 Fed. 364. As to form, see *Groton Bridge & Mfg. Co. v. American Bridge Co.* supra.

While informality in petition and bond may be waived by a failure to promptly object, yet a failure to file a bond is not waived. 25 Stat. at L. 435, chap. 866, U. S. Comp. Stat. 1901, p. 510; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839; *Austin v. Gagan*, 5 L.R.A. 476, 39 Fed. 626; *Clark v. Guy*, 114 Fed. 783.

Informality may be waived or amended. *Coburn v. Cedar Valley Land & Cattle Co.* 25 Fed. 791; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616; *Probst v. Cowen*, 91 Fed. 929; *Deford v. Mehaffy*, 13 Fed. 487.

It seems that when made by attorney without authority, it may be ratified before motion to remand. *Ashe v. Union Cent.*

L. Ins. Co. 115 Fed. 236. See Alexandria Nat. Bank v. Willis C. Bates Co. 87 C. C. A. 643, 160 Fed. 839. New Code, chap. 3, sec. 29.

*Effect of Filing Petition and Bond.*

The petition and bond must be filed in the county in which the venue is laid (Noble v. Massachusetts Ben. Asso. 48 Fed. 337), and a proper petition and bond having been filed, it does not require any order of the State court to remove the case; the jurisdiction of the State court ceases, and the jurisdiction of the Federal court attaches at once. Eisenmann v. Delemar's Nevada Gold Min. Co., 87 Fed. 248; Mutual L. Ins. Co. v. Langley, 145 Fed. 415; Barlow v. Chicago & N. W. R. Co., 164 Fed. 765; La Page v. Day, 74 Fed. 977; Mecke v. Valley Town Mineral Co., 89 Fed. 209; Johnson v. Computing Scale Co., 139 Fed. 339; Postal Teleg. Cable Co., v. Southern R. Co. 88 Fed. 803; Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354; National S. S. Co., v. Tugman, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; Burlington, C. R. & N. R. Co., v. Dunn, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; Hamilton v. Fowler, 83 Fed. 325; Crehore v. Ohio & M. R. Co., 131 U. S. 243, 33 L. ed. 145, 9 Sup. Ct. Rep. 692. There has been much conflict as to the proposition of the *eo instanti* removal upon filing petition and bond. See Mays v. Newlin, 143 Fed. 576, 577, collecting authorities pro and con; Coker v. Monaghan Mills, 110 Fed. 806. The State court declining to remove does not affect the jurisdiction of the United States court if the case is removable. Kern v. Huidekoper, 103 U. S. 490, 26 L. ed. 356; Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Atlantic Coast Line R. Co., v. Bailey, 151 Fed. 891. Whatever be the action of the State court the defendant may file the record in the Federal court and proceed with the case as if originally filed there, for the jurisdiction of the Federal court depends on the removability of the case, and not the order of the State court (Lund v. Chicago, R. I. & P. R. Co., 78 Fed. 385; Hickman v. Missouri, K. & T. R. Co., 97 Fed. 113; Kirby v. Chicago & N. W. R. Co., 106 Fed. 551; Chesapeake & O. R. Co., v. White, 111 U. S. 137, 28 L. ed. 378, 4 Sup. Ct. Rep. 353; Lake Street Elev. R. Co., v. Farmers' Loan & T. Co., 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed.

773; *Atlantic Coast Line R. Co., v. Bailey*, 151 Fed. 893); and should the Federal court decide for the defendant, he may enjoin the execution of a State judgment against him in the same case, or the State court from further proceeding (*Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 896; *Dietzsch v. Huidekoper* [*Kern v. Huidekoper*] 103 U. S. 498, 26 L. ed. 498; *Wagner v. Drake*, 31 Fed. 852; *Frishman v. Insurance Cos.*, 41 Fed. 449; *French v. Hay* [*French v. Stewart*] 22 Wall. 252, 22 L. ed. 858; *Chicago, R. I. & P. R. Co., v. Stepp*, 151 Fed. 909; *Missouri, K. & T. R. Co., v. Scott*, 4 Woods, 386, 13 Fed. 793. See *Coeur D'Alene R. & Nav. Co., v. Spalding*, 35 C. C. A. 302, 93 Fed. 280; *Mutual L. Ins. Co., v. Langley*, 145 Fed. 415), and thus protect its jurisdiction and judgment, as we have before seen. *Baltimore & O. R. Co., v. Ford*, 35 Fed. 173; *Bowdoin College v. Merritt*, 59 Fed. 7. Where the State court proceeds to trial under these circumstances, its judgment would be a nullity if the cause had been properly removed. *Texas & P. R. Co., v. Davis*, 93 Tex. 378, 55 S. W. 562. See however, *Pioneer Sav. & L. Co., v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 168.

If the clerk of the State court refuses to furnish the record for removal after legal fees tendered, he subjects himself to a fine and imprisonment, or the district court may by writ of certiorari command the State court to send up the record, or, if impossible to obtain the record from any cause, the moving party may file a copy of the paper or proceeding by which the same was commenced, and the other party may be required to plead, and the action proceed to judgment. Sec. 39, New Code, chap. 3, effective January 1st, 1912.

### *Notice of Filing Petition for Removal.*

When removal is based on diversity of citizenship, no notice is necessary of filing the petition (*Ashe v. Union Cent. L. Ins. Co.* 115 Fed. 235), and it has been repeatedly decided that there is no statute or rule of the Federal court which required notice of a petition for removal to be given. *Chiatovich v. Hanchett*, 78 Fed. 194.

See sec. 29, chap. 3, New Code, requiring notice of filing petition and bond for removal to be given prior

to filing the same; the copy of the record to be filed in the United States district court within thirty days from the date of filing the petition and bond. The parties removing have thirty days after filing the record to plead, answer, or demur.

### *Power of State Court.*

The rule is certain, that on the filing of the petition and bond in the State court for removal, in a *removable* case, no further action can be taken by the State court except to remove, as it is divested of jurisdiction over the case (*Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 653; *Home Ins. Co. v. Morse*, 20 Wall. 454, 22 L. ed. 369; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 136, 141, 26 L. ed. 96, 98; *Carson v. Dunham*, 121 U. S. 427, 30 L. ed. 994, 7 Sup. Ct. Rep. 1030; *Marshall v. Holmes*, 141 U. S. 595, 35 L. ed. 872, 12 Sup. Ct. Rep. 62; *Monroe v. Williamson*, 81 Fed. 987; *Ashe v. Union Cent. L. Ins. Co.* 115 Fed. 234), and need not present petition to the Federal court. *Waite v. Phoenix Ins. Co.* 62 Fed. 769. New Code, chap. 3, sec. 29.

But the State court is not altogether an automaton in dealing with the question of removal; it is not bound to surrender its jurisdiction on a petition for a removal, until a case is made which on the face of the record shows the petitioner has a right to the transfer. *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Mays v. Newlin*, 143 Fed. 576; *Coker v. Monaghan Mills*, 110 Fed. 806; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068; *Home Ins. Co. v. Morse*, 20 Wall. 459, 22 L. ed. 370; *Kansas City, Ft. S. & M. R. Co. v. Daughtery*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 364; *Crehore v. Ohio & M. R. Co.* 131 U. S. 241-243, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Johnson v. Wells, F. & Co.* 91 Fed. 25; *Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 773.

It may act on the law, but not the facts (*Powers v. Chesapeake & O. R. Co.* 65 Fed. 132; *Coker v. Monaghan Mills*,

110 Fed. 806, and cases cited; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Texas & P. R. Co. v. Eastin*, — Tex. Civ. App. —, 89 S. W. 441, 442); but if solely a question of law the Federal court may pass upon it as well as the State court. *Atlanta Coast Line R. Co. v. Bailey*, 151 Fed. 892, 893. If a *prima facie* case is not shown by the record, then the court can refuse to remove. *Stone v. South Carolina*, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Powers v. Chesapeake & O. R. Co.* 65 Fed. 132; *Springer v. Howes*, 69 Fed. 850; *Crehore v. Ohio & M. R. Co.* 131 U. S. 244, 33 L. ed. 145, 9 Sup. Ct. Rep. 692; *La Montagne v. T. W. Harvey Lumber Co.* 44 Fed. 647; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 148; *Foster v. Paragould Southeastern R. Co.* 74 Fed. 273; *Florida v. Charlotte Harbor Phosphate Co.* 20 C. C. A. 538, 41 U. S. App. 405, 74 Fed. 578; *Wabash R. Co. v. Barbour*, 19 C. C. A. 546, 43 U. S. App. 102, 73 Fed. 515; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 366.

*Issue of Fact as to Removability Tried in Federal Court.*

The State court can decide for itself whether, as a matter of law, the petitioner is entitled to removal. *Coker v. Monaghan Mills*, 110 Fed. 806, and authorities cited. If, however, the record makes a *prima facie* case, and the issues raised are upon facts stated in the petition, these issues must be tried in the Federal court, and the jurisdiction of the State court is in abeyance until the Federal court trying the issues remands the case. *Dow v. Bradstreet Co.* 46 Fed. 828; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 653; *Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Donovan v. Wells, F. & Co.* 22 L.R.A.(N.S.) 1250, 94 C. C. A. 609, 169 Fed. 366; *Chesapeake & O. R. Co. v. McGabe*, 213 U. S. 208, 53 L. ed. 766, 29 Sup. Ct. Rep. 430; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; see *Snohomish County v. Puget Sound Nat. Bank*, 81 Fed. 518.

*Should Be Presented to State Court.*

It has been held that the cause will be remanded, where it

appears that the petition and bond for removal were filed in the State court in vacation, and there was nothing to show that they were ever presented to the State court. *Fox v. Southern R. Co.* 80 Fed. 945; see—*Mays v. Newlin*, 143 Fed. 576, 577; giving authorities pro and con; *Roberts v. Chicago, St. P. M. & O. R. Co.* 45 Fed. 433; *Williams v. Massachusetts Ben. Asso.* 47 Fed. 534. But in *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 284–289, a contrary view is taken. *Brown v. Murray, M. & Co.* 43 Fed. 614. The better rule is, that it should be brought to the attention of the State court (*Ibid.*), and may be so brought by one motion. *Monroe v. Williamson*, 81 Fed. 977; *La Page v. Day*, 74 Fed. 977; *McAlister v. Chesapeake & O. R. Co.* 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068. It is the more decorous practice, and the safer practice. *Noble v. Massachusetts Ben. Asso.* 48 Fed. 338–339.

### *Order of Removal.*

It is not necessary to enter an order of removal (*Mutual L. Ins. Co. v. Langley*, 145 Fed. 415; *La Page v. Day*, 74 Fed. 978; *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385; *Noble v. Massachusetts Ben. Asso.* 48 Fed. 338; *Wilson v. Western U. Co.* 34 Fed. 561; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 284); nor, as we have seen, would refusal affect the right, if removable.

An exception to the rule that it is necessary to present the petition and bond to the judge of the State court has been indicated in *Brown v. Murray Nelson & Co.* 43 Fed. 614 and *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 289. It seems under some conditions it may be granted by a judge in chambers (*Mecke v. Valletown Mineral Co.* 35 C. C. A. 151, 93 Fed. 697; *Groton Bridge & Mfg. Co. v. American Bridge Co.* 137 Fed. 288), and under some conditions by a clerk of the State court (*Sanderlin v. People's Bank*, 140 Fed. 191).

If the State court refuses to enter an order of removal wrongfully, but retains jurisdiction and hears the cause, the wrong, if any, can be remedied by reserving the question, and a final appeal to the Supreme Court of the United States, should the highest court of the State having jurisdiction on appeal sustain the ruling of the lower court on the application to remove.



Coker v. Monaghan Mills, 110 Fed. 806; Home L. Ins. Co. v. Dunn, 19 Wall. 224, 225, 22 L. ed. 69; Springer v. Howes, 69 Fed. 849; McAlister v. Chesapeake & O. R. Co. 85 C. C. A. 316, 157 Fed. 742, 13 A. & E. Ann. Cas. 1068. Or if rightfully removed, the Federal court may enjoin the further proceeding in the State court, as heretofore stated. Traction Co. v. Madisonville St. Bernard Min. Co. 196 U. S. 245, 49 L. ed. 464, 25 Sup. Ct. Rep. 251; Chicago, R. I. & P. R. Co. v. Stepp, 151 Fed. 914.

Again, the refusal of the State court, rightfully or wrongfully, does not prevent the removal. The petitioner can file the record in the Federal court and proceed with his case there, though pending in the State court; and filing defenses in the State court after removal would not affect his proceedings in the Federal court. See Mecke v. Valley Town Mineral Co. 89 Fed. 211; see Texas & P. R. Co. v. Eastin, 214 U. S. 153, 53 L. ed. 946, 29 Sup. Ct. Rep. 564, where an affirmative remedy asserted in the State court estopped a party from attacking the refusal of the State court to remove the case. The result would be that if the Federal court determines that the case is removable, and takes jurisdiction, the party removing may enjoin the action of the State court, or enjoin the plaintiff from proceeding under the decree of the State court. French v. Hay (French v. Stewart), 22 Wall. 252, 22 L. ed. 858; Mutual L. Ins. Co. v. Langley, 145 Fed. 421, 422; Dietzsch v. Huidekoper (Kern v. Huidekoper), 103 U. S. 498, 26 L. ed. 498. If the cause was removable, all action by the State court would be without jurisdiction, and void. Flint v. Coffin, 100 C. C. A. 342, 176 Fed. 872; Virginia v. Rives, 100 U. S. 317, 25 L. ed. 669; McAlister v. Chesapeake & O. R. Co. 85 C. C. A. 316, 157 Fed. 741, 13 A. & E. Ann. Cas. 1068; Madisonville Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; Kern v. Huidekoper, 103 U. S. 492, 26 L. ed. 357; Baltimore & O. R. Co. v. Koontz, 104 U. S. 14, 26 L. ed. 645.

*Power of the Federal Court Between Filing Petition for Removal and Filing the Record.*

We have just seen that as soon as the petition and bond for

removal are filed in the State court its jurisdiction ceases, and the question becomes important as to what action the Federal court can take before the record is filed therein. *Coeur D'Alene R. & Nav. Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 285, and authorities.

It was held in *Re Barnesville & M. R. Co.* 2 McCrary, 216, 4 Fed. 10, that the jurisdiction of the Federal court is not complete, so as to hear and determine the cause before the day prescribed by the statute, even though the transcript has been filed (Removal cases, 100 U. S. 475, 25 L. ed. 600), but that many incidental proceedings may be taken, and provisional remedies, such as attachment, etc., granted. *Hamilton v. Fowler*, 83 Fed. 321; *Goldberg B. & Co. v. German Ins. Co.* 152 Fed. 831; *Ryder v. Bateman*, 93 Fed. 23; *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 696.

When the record is filed in the Federal court before the return day,—that is, the next regular term after the removal, the Federal court cannot entertain a motion to remand even for want of jurisdiction. *Kansas City & T. R. Co. v. Interstate Lumber Co.* 36 Fed. 9; *Torrent v. S. K. Martin Lumber Co.* 37 Fed. 727. However, these cases were disapproved in *Thompson v. Chicago, St. P. & K. C. R. Co.* 60 Fed. 773, where the party moving to remand had filed the record and given proper notice of the motion, following *Delbanco v. Singletary*, 40 Fed. 181, and *Mills v. Newell*, 41 Fed. 529. See *Texas & St. L. R. Co. v. Rust*, 5 McCrary, 348, 17 Fed. 275, 276.

### *Cannot Enjoin.*

The Federal court cannot enjoin proceedings in a State court, where, though a petition and bond for removal have been filed, no action has been taken thereon by the State court, nor a copy of the record been entered in the Federal court. *Cœur D'Alene R. & Nav. Co. v. Spalding*, 35 C. C. A. 295, 93 Fed. 280.

While it does not seem to be well settled what are the powers of a Federal court over the intermediate state of the case, between the filing of the petition and bond in the State court, and the return day to the Federal court, which, as said, is the first day of the next succeeding term of the Federal court, yet I

think the rule may be stated, first, that the State court jurisdiction ceases, and the Federal court jurisdiction attaches upon the filing of the petition and bond for removal; second, that while the plaintiff in the State court has not to appear in the Federal court before the return day, and therefore the Federal court has no jurisdiction to proceed to hear the cause on its merits before such return day, or entertain any issue as to the removal itself, yet if any extraordinary proceeding be necessary to preserve the property or rights of the litigants, then upon notice either party may be required to appear for that purpose, and the court may grant the relief. Authorities above; *Hamilton v. Fowler*, 83 Fed. 321; *Goldberg B. & Co. v. German Ins. Co.* 152 Fed. 831; see *Ryder v. Bateman*, 93 Fed. 16.

### *Cannot Take Depositions.*

It has been held that an application to take depositions, made to the Federal court while the case was in a state of transition, would not be granted, as no extraordinary condition appeared calling for the exercise of the power of the Federal court. *North American Transp. & Trading Co. v. Howells*, 58 C. C. A. 442, 121 Fed. 698. Your attention is called to a review of the cases upon the subject in *Hamilton v. Fowler*, 83 Fed. 321.

### *Motion to Remand.*

In *Hartford & C. W. R. Co. v. Montague*, 94 Fed. 227, it is declared the settled practice in the second circuit to allow a motion to remand to be made at once on the removal of a cause, without waiting for the next term, and the plaintiff may file the record if the defendant does not.

### *Filing Transcript.*

We have seen that the filing of the petition and bond for removal vests jurisdiction in the Federal court for all purposes, but the regular course of proceeding is suspended until the record of the case below is filed in the Federal court. So filing the transcript, while not necessary to jurisdiction, yet is necessary for the court to proceed with the trial. *Goldberg*

B. & Co. v. German Ins. Co. 152 Fed. 831. (See "Transmitting the Record.")

The record of the removed case must be filed on or before the first day of the next session of the Federal court after the application for removal, and by this is meant the next session of the Federal court sitting in the Federal district to which the county where the suit originated attached. 30 Stat. at L. 397, chap. 236, U. S. Comp. Stat. 1901, p. 431; sec. 1, act 1888; 25 Stat. at L. p. 435, chap. 866, U. S. Comp. Stat. 1901, p. 510; *Goldberg, B. & Co. v. German Ins. Co.* 152 Fed. 831; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 16, 26 L. ed. 646. But filing the record is not a question of jurisdiction, and the right is not lost by delay, for the court may permit the record to be filed after the time appointed by statute, for proper cause shown. *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 16, 26 L. ed. 646; *Rowell v. Hill*, 28 Fed. 434; *Lucker v. Phoenix Assur. Co.* 66 Fed. 162; *Burgunder v. Browne*, 59 Fed. 498; *Eisenmann v. Delemar's Nevada Gold Min. Co.* 87 Fed. 250 and cases cited; *Pierce v. Corrigan*, 77 Fed. 657; *Hatcher v. Wadley*, 84 Fed. 915. See New Code, effective Jan. 1st, 1912, giving thirty days to file the record in the Federal Court, and giving parties thirty days from the filing in the Federal court to plead, answer, or demur to the complaint, etc. The cause then proceeds as if originally commenced in the Federal court. Sec. 29, chap. 3; also sec. 38, *id.*

## CHAPTER CXXIII.

### STATUS AFTER REMOVAL.

The case is docketed in the Federal court, retaining the same status as to all process and proceedings that have been taken in the State court, and which have the same effect as if sued out in the Federal court. Secs. 4 and 6, act 1875; 1 U. S. Rev. Stat. Supp. 83. See sec. 36, New Code, chap. 3; also sec. 38, New Code, chap. 3. *Cleaver v. Traders' Ins. Co.* 40 Fed. 713; *Davis v. St. Louis & S. F. R. Co.* 25 Fed. 786; *Bryant v. Thompson*, 27 Fed. 881; *Guernsey v. Cross*, 153 Fed. 827; *Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co.* 46 Fed. 590; *Duncan v. Gegan*, 101 U. S. 810-812, 25 L. ed. 875, 876; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Bragdon v. Perkins-Campbell Co.* 82 Fed. 338; *Allmark v. Platte S. S. Co.* 76 Fed. 615; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 930; *Denison v. Shawmut Min. Co.* 124 Fed. 860; *Virginia-Carolina Chemical Co. v. Sundry Ins. Co.* 108 Fed. 454; *Eureka & K. R. Co. v. California & N. R. Co.* 103 Fed. 897; *Porter Land & Water Co. v. Baskin*, 43 Fed. 325; *Mercantile Nat. Bank v. Barron*, 165 Fed. 832.

Thus the lien of an attachment properly sued out in the State court is not affected by removal. *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 267; *Hubbard v. Central R. Co.* 135 Fed. 256; *Lebensberger v. Scofield*, 71 C. C. A. 476, 139 Fed. 380. And where the action in the State court against a nonresident is by attachment, the removal by him does not give the Federal court jurisdiction of his person. *Wells v. Clark*, 136 Fed. 462, overruled in 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43, followed in *Mercantile Nat. Bank v. Barron*, 165 Fed. 832. See *Purdy v. Wallace Müller & Co.* 81 Fed. 513. New Code, sec. 36.

The rule as above given applies unless repugnant to the Constitution and laws. See *Texas & P. R. Co. v. Wilder*, 35 C.

C. A. 105, 92 Fed. 957, refusing to allow depositions taken in the State court to be read in the Federal court. *Zych v. American Car & Foundry Co.* 127 Fed. 726-727; see *Texas & P. R. Co. v. Watson*, 50 C. C. A. 230, 112 Fed. 402; *Hanks Dental Asso. v. International Tooth Crown Co.* 194 U. S. 309, 48 L. ed. 991, 24 Sup. Ct. Rep. 700.

### *Defenses to be Heard in the Federal Court.*

The purpose of the removal act is to give the nonresident defendant the privilege of having his defenses heard in the Federal court (*Wabash Western R. Co. v. Brow*, 164 U. S. 277-278, 41 L. ed. 433, 434, 17 Sup. Ct. Rep. 126), and he is required to file his petition for removal on or before the time he is required to file his defenses in the State court. *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 686, 38 L. ed. 316, 14 Sup. Ct. Rep. 533; sec. 3, act 1875. (See "When Not Removed in Time," chapter 124). And this rule applies whatever may have been the proceedings in the State court before the time the defendant was required to remove (*Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 661; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 930), unless trial on the merits has begun in the State courts though raised by demurrer (*Alley v. Nott*, 111 U. S. 476, 477, 28 L. ed. 492, 4 Sup. Ct. Rep. 495; *Bank of Maysville v. Claypool*, 120 U. S. 270, 30 L. ed. 633, 7 Sup. Ct. Rep. 545; *Gregory v. Hartley*, 113 U. S. 742-746, 28 L. ed. 1150-1152, 5 Sup. Ct. Rep. 743), but not hearing a preliminary motion to dissolve an injunction in the State court (*Cella v. Brown*, 136 Fed. 439, 440, and cases cited; see *Atlanta, K. & N. R. Co. v. Southern R. Co.* 66 C. C. A. 601, 131 Fed. 661-663).

### *When Plaintiff Dismisses After Removed.*

Where plaintiff appears and dismisses his suit in the Federal court after removal, he must file a new suit; he cannot proceed on the old pleading in the State court. *Texas & P. R. Co. v. Huber*, — Tex. Civ. App. —, 95 S. W. 569, 570.

## CHAPTER CXXIV.

### REMANDING.

I have thus given the acts of Congress affecting the removal of a suit from the State court to the United States circuit court, and the status of the case after removal. It is not my purpose to discuss these acts further than may be necessary to develop the practice of the United States circuit court upon motions to *remand*. Excellent works on removals have been given to the profession, and these must be consulted for procedure and forms.

I shall assume that the cause has been removed under one of the provisions of the act as above given, and will only discuss such steps as should be taken in the Federal court after the removal.

The first step to be taken after the case has been removed is to examine whether the defendant or defendants have complied with the Federal statutes in the procedure required, or the grounds upon which removals are permitted. They must be followed because jurisdictional. *Mayo v. Dockery*, 108 Fed. 899; *Wabash Western R. Co., v. Brow*, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126. And the right to determine these questions is wholly with the Federal courts after removal (*Dow v. Bradstreet Co.*, 46 Fed. 828; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Postal Teleg. Cable Co. v. Southern R. Co.* 88 Fed. 805; *Woodson County v. Toronto Bank*, 128 Fed. 159), because, as said, on filing of the petition and bond the removal is effected at once (*Mecke v. Valley Town Mineral Co.* 89 Fed. 209-211).

If the jurisdictional facts are not shown, however, the State court is not bound to give up its jurisdiction (*Stone v. South Carolina*, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Coker v. Monaghan Mills*, 110 Fed. 806; *Burlington, C. R. &*

N. R. So. v. Dunn, 122 U. S. 516, 30 L. ed. 1160, 7 Sup. Ct. Rep. 1262; Powers v. Chesapeake & O. R. Co. 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264); and if the case goes to judgment in the State court, you may review the refusal by writ of error to the Supreme Court of the United States. Ibid.; Missouri, P. R. Co. v. Fitzgerald, 160 U. S. 557-582, 40 L. ed. 536-542, 16 Sup. Ct. Rep. 389; Stone v. South Carolina, 117 U. S. 432, 29 L. ed. 962, 6 Sup. Ct. Rep. 799.

### *Statutes Controlling the Remanding of Causes.*

It is provided by section 5 of the act of 1875, that if in any suit removed to the Federal court from a State court it shall appear to the satisfaction of said circuit court at *any time* after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court or that parties to such suit in the State court have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case removable into the Federal court, the said circuit court shall proceed no further therein, but shall remand it to the court from which it was removed, making such order as to costs as may be just.

Again, under clause 2 of the act of 1888 it is provided for remanding causes removed on the ground of local prejudice as follows: "At any time before the trial of any suit which is now pending in any circuit court, or may be hereafter entered therein, and which has been removed from a State court on the ground of local prejudice, the circuit court shall, on the application of the other party, examine into the truth of the affidavit of local prejudice, and unless it shall appear to the satisfaction of the circuit court that said party will not obtain justice in the State court it shall cause the suit to be remanded to the State court.

By the sixth clause of section 2 of the act there is no appeal from the order to remand.

### *Causes for Remanding.*

Thus, having seen the statutory duty of the circuit courts of



the United States as to remanding causes, I shall now inquire into the causes for remanding, assuming that a proper petition and bond have been filed; and first—

*When Not Removed in Time.*

The first inquiry would be as to the time the petition and bond for removal were filed in the State court, and the Federal court must determine it. *Fidelity Trust & S. Co. v. Newport News & M. Valley Co.* 70 Fed. 403. The statute, as we have seen, requires it to be filed at or before the time when by the State law the defendant is required to plead or answer to the petition in the State court, which, in Texas, must be on or before the second day of the return term of the citation. *Tex. Rev. Stat.* 1447, 1263. *First Nat. Bank v. Appleyard*, 138 Fed. 939; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*) 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Daugherty v. Western U. Teleg. Co.* 61 Fed. 138; *American Bonding Co. v. Mills*, 81 C. C. A. 325, 152 Fed. 107; *Goldberg v. German Ins. Co.* 152 Fed. 831; *Overholt v. German American Ins. Co.* 155 Fed. 488; *Quilhot v. Hamer*, 158 Fed. 188; *Goldey v. Morning News*, 156 U. S. 524, 39 L. ed. 519, 15 Sup. Ct. Rep. 559; *Fidelity & C. Co. v. Hubbard*, 117 Fed. 952; *Oliver v. Iowa C. R. Co.* 102 Fed. 371; *Gregory v. Boston Safe Deposit & T. Co.* 88 Fed. 4; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 27; *Maher v. Tower Hotel Co.* 94 Fed. 226; *First Littleton Bridge Co. v. Connecticut River Lumber Co.* 71 Fed. 225. See *Winkler v. Chicago & E. I. R. Co.*—see, also, 120 U. S. 786–794, 108 Fed. 307, as to the time required under the Federal acts of 1789, 1866, and 1875.

When the service on the nonresident defendant has been made by publication, which is required to be published for a specific number of weeks, the full time must expire before the defendant is required to answer within the removal act, though the last publication was made before the time expired. *Tenney v. American Pipe Mfg. Co.* 96 Fed. 919; *Batt's Rev. Stat. (Tex.)* 1235, 1264.

Again, when the State law permits a person served by publication to have a retrial if appearing within a certain time, S. Eq.—52.

the cause could not be removed by such defendant on his appearance. *Davis v. Harris*, 124 Fed. 713.

If the petition for removal is filed after the day upon which a dilatory plea or the answer is required to be filed by the State law, the State court may refuse the removal, and, if removed, the Federal court should remand (*Head v. Selleck*, 110 Fed. 786; *Lantz v. Fretts*, 173 Fed. 1008, and cases cited. *First Nat. Bank v. A. E. Appleyard & Co.* 138 Fed. 939; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 673, 678, 38 L. ed. 311, 313, 14 Sup. Ct. Rep. 533; *Gregory v. Boston Safe Deposit & T. Co.* 88 Fed. 3; *First Littleton Bridge Corp. v. Connecticut River Lumber Co.* 71 Fed. 225; *Daugherty v. Western U. Teleg. Co.* 61 Fed. 138; *Laidly v. Huntington*, 121 U. S. 181, 30 L. ed. 884, 7 Sup. Ct. Rep. 855; *Delbanco v. Singletary*, 40 Fed. 178; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578); and when the action is joint, if by expiration of time one defendant loses his right the other is bound (*Calderhead v. Downing*, 103 Fed. 29 and cases cited; see *Morgan's L. & T. R. & S. S. Co. v. Street*, —Tex. Civ. App.—, 122 S. W. 270); but this failure to file the petition in time may be waived, as it has been held that it is not essential to jurisdiction (*Powers v. Chesapeake & O. R. Co.* 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep. 264, and cases cited; *Martin v. Baltimore & O. R. Co.* [*Gerling v. Baltimore & O. R. Co.*] 151 U. S. 688, 38 L. ed. 316, 14 Sup. Ct. Rep. 533; *French v. Hay*, 22 Wall. 238, 22 L. ed. 801; *Knight v. International & G. N. R. Co.* 9 C. C. A. 376, 23 U. S. App. 356, 61 Fed. 90), and going to trial in the Federal court would waive (*Newman v. Schwerin*, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870; *Collins v. Stott*, 76 Fed. 614).

So where the plaintiff appears for any other purpose than to object to the removal, and to move to remand would waive.

Again, where one consents to the removal he cannot object to the time of removal. *Connell v. Smiley*, 156 U. S. 339, 39 L. ed. 444, 15 Sup. Ct. Rep. 353.

When the service of summons in the State court is void, the time limited by statute does not bind the defendant, but he may appear and remove even after judgment. *Tortat v. Hardin Min. & Mfg. Co.* 111 Fed. 426; *Cady v. Associated*

Colonies, 119 Fed. 424; Ward v. Congress Constr. Co. 39 C. C. A. 669, 99 Fed. 598.

*When Motion to Remand Made.*

The motion to remand on the ground that the petition for removal was not filed in time should be made promptly as it may be waived, because, as said, the failure to file in time is not fundamental, but in a sense modal and formal (Act 1888, sec. 3; Ayers v. Watson, 113 U. S. 598, 28 L. ed. 1094, 5 Sup. Ct. Rep. 641; Collins v. Stott, 76 Fed. 614; Powers v. Chesapeake & O. R. Co. 169 U. S. 99, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; Newman v. Schwerin, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870); and acts recognizing the jurisdiction of the Federal court, or great delay in the motion to remand, would waive the failure of the defendant to file the petition for removal in time (Ibid.; Guarantee Co. of N. A. v. Hanway, 44 C. C. A. 312, 104 Fed. 369, 374, and cases cited; Atlantic, K. & N. R. Co. v. Southern R. Co. 66 C. C. A. 601, 131 Fed. 660, 661; Baltimore & O. R. Co. v. Ford, 35 Fed. 170; Hamilton v. Fowler, 83 Fed. 321; Newman v. Schwerin, 10 C. C. A. 129, 22 U. S. App. 393, 61 Fed. 870; Martin v. Baltimore & O. R. Co. [Gerling v. Baltimore & O. R. Co.] 151 U. S. 688, 38 L. ed. 316, 14 Sup. Ct. Rep. 533).

*Effect of Extension of Time to Answer.*

The agreement of parties to extend the time to answer cannot change the statute requiring the petition for removal to be filed at or before the time required by the State law to answer, and it must be filed as required, whether there by an agreement to extend the time to answer or not. There has, however, been such conflict of opinion that it would be proper to say the rule varies in the different circuits. Tevis v. Palatine Ins. Co. 149 Fed. 561.

Thus, the rule, as stated above, has been upheld in Austin v. Gagan, 5 L.R.A. 476, 39 Fed. 626; Dixon v. Western U. Teleg. Co. 38 Fed. 377; Martin v. Carter, 48 Fed. 596; Yarnell v. Felton, 102 Fed. 369; same case 104 Fed. 161; Champlain Constr. Co. v. O'Brien, 104 Fed. 932, 933; Velie v.

Manufacturers' Acci. Indemnity Co. 40 Fed. 545; Ruby Canyon Gold Min. Co. v. Hunter, 60 Fed. 305; Schipper v. Consumer Cordage Co. 72 Fed. 803. A distinction is drawn in this last case between an extension of time by agreement and by the order of the court. *Ibid.*; Fidelity Trust & S. V. Co. v. Newport News & M. Valley Co. 70 Fed. 406; Mecke v. Valley Town Mineral Co. 89 Fed. 209; Price v. Lehigh Valley R. Co. 65 Fed. 826. See Spangler v. Atchison, T. & S. F. R. Co. 42 Fed. 305, as to distinction between order of court and rule of court as to extension of time. While it has been held *contra* in Russell v. Harriman Land Co. 145 Fed. 745; Groton Bridge & Mfg. Co. v. American Bridge Co. 137 Fed. 297-299; Chiatovich v. Hanchett, 78 Fed. 193; People's Bank v. *Ætna* Ins. Co. 53 Fed. 161; Dancel v. Goodyear Shoe Machinery Co. 106 Fed. 551; Rycroft v. Green, 49 Fed. 177; Lord v. Lehigh Valley R. Co. 104 Fed. 929; Mayer v. Ft. Worth & D. C. R. Co. 93 Fed. 601; Collins v. Stott, 76 Fed. 613; Phenix Ins. Co. v. Charleston Bridge Co. 13 C. C. A. 58, 25 U. S. App. 190, 65 Fed. 628; See Tevis v. Palatine Ins. Co. 149 Fed. 561, 562, collecting authorities *pro* and *con*.

Again, it has been held that the time to file a petition for removal cannot be extended when the court extends the time to answer on an *ex parte* order (Hurd v. Gere, 38 Fed. 537); nor when the time has been extended by rule of court (See Spangler v. Atchison, T. & S. F. R. Co. 42 Fed. 305 as to distinction between order of court and rule of court). The Federal court will not take judicial notice of a rule of court extending the time for pleading beyond the statute. Yarnell v. Felton, 104 Fed. 161, S. C. 102 Fed. 369.

The Federal courts do not take judicial notice of the rules of the State courts. Randall v. New England Order of Protection, 118 Fed. 782.

I submit the rule as first stated is correct; the act requires the petition to be filed at or before the time when answer is due according to the State law, and a proper construction clearly excludes the idea that it may be dependent on the agreement of parties, or the extension of time by a court to answer beyond that fixed by the statute. Besides, the right of removal must appear in the case as the plaintiff has made it, and does not in any way depend on the answer to be filed; and the right

of removal existing and apparent when the agreement to extend the time for answering is made, should be construed to be a waiver of the right of removal, rather than an extension of the time to apply for it.

*When Right of Removal Arises After the Time Fixed by Statute.*

Sometimes the right of removal does not exist at the time when by the State law the answer is to be filed, but may arise in the subsequent proceedings in the State court, as where the amended petition first discloses the right to remove, or other defendants made (*Jones v. Mosher*, 46 C. C. A. 471, 107 Fed. 563; *Guarantee Co. of N. A. v. Hanway*, 44 C. C. A. 312, 104 Fed. 374; *Green v. Valley*, 101 Fed. 884; *Enders v. Lake Erie & W. R. Co.* 101 Fed. 203; *Bailey v. Mosher*, 95 Fed. 223; *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 193; *Barber v. Boston & M. R. Co.* 145 Fed. 52; *Robinson v. Parker-Washington Co.* 170 Fed. 850; *Roberts v. Chicago, B. & Q. R. Co.* 168 Fed. 316; *Youtsey v. Hoffman*, 108 Fed. 693; *Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598; *West Virginia v. King*, 112 Fed. 369), as, for instance, when by change of parties by dismissal, or otherwise, the controversy for the first time becomes one wholly between citizens of different States (*Ibid.*; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Green v. Valley*, 101 Fed. 882; *Ward v. Congress Constr. Co.* 39 C. C. A. 669, 99 Fed. 598; *Diday v. New York, P. & O. R. Co.* 107 Fed. 567; *Calderhead v. Downing*, 103 Fed. 27; but the right may be lost, see *Morgan's L. & T. R. & S. S. Co. v. Street*, —Tex. Civ. App.—, 122 S. W. 270; *Huber v. Texas & P. R. Co.* —Tex. Civ. App.—, 113 S. W. 984); or when the original petition in the State court is for an amount not in excess of two thousand dollars, but plaintiff by amendment greatly increases the claim so as to bring it within Federal jurisdiction (*Enders v. Lake Erie R. Co.* 101 Fed. 203; *Price v. Ellis*, 129 Fed. 485, 486; *Walcott v. Watson*, 46 Fed. 529; *Clarkson v. Manson*, 18 Blatchf. 443, 4 Fed. 257; *Jones v. Mosher*, 46 C. C. A. 471, 107 Fed. 563, citing *Northern P. R. Co. v. Austin*, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep.

758; *Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232; *Peterson v. Chicago, M. & St. P. R. Co.* 108 Fed. 561; *Simmons v. Mutual Reserve Fund Life Asso.* 114 Fed. 785); or where by amendment the cause of action is made to depend on a Federal question not appearing in the original petition (*Green v. Valley*, 101 Fed. 882; *Bailey v. Mosher*, 95 Fed. 223; *Guarantee Co. of N. A. v. Hanway*, 44 C. C. A. 312, 104 Fed. 369); but the amendment must, in effect, state a new cause of action (*Painter v. New River Mineral Co.* 98 Fed. 544).

In either of the events happening as above stated, a motion to remove to the Federal court promptly made should be sustained, and therefore a motion to remand when a motion is made under these conditions will not be sustained.

In determining the promptness with which a motion to remove is made, time must be calculated from the filing of the amended petition. *Evans v. Dillingham*, 43 Fed. 177.

### *Effect of Filing Answer in State Court.*

The filing of an answer in the State court before the time has elapsed for pleading or answering under the State law, and the petition for removal to be filed, as when necessary to move the dismissal of a preliminary injunction, does not affect the right to remove within the period permitted by statute. *Cella v. Brown*, 136 Fed. 439; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 93, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Champlain Constr. Co. v. O'Brien*, 104 Fed. 930; *Wilcoxon v. Chicago, B. & Q. R. Co.* 116 Fed. 444; *Sidway v. Missouri Land & Live Stock Co.* 116 Fed. 382-394, and cases cited. As to effect of plea to jurisdiction of the State court, see *Olds v. City Trust S. D. & Surety Co.* 114 Fed. 975. The rule may be stated that whether necessary to be filed in aid of some preliminary procedure or not, the mere filing of an answer in the State court before the time has elapsed to file a petition for removal does not bar the right to remove within the time permitted by statute. The right is only lost by going beyond the absolutely required time. *Champlain Constr. Co. v. O'Brien*, 104 Fed. 933; *Donahue v. Calumet Fire Clay Co.* 94 Fed. 27.

But it seems that where a State fixes no time for filing an

answer, that a demurrer to the bill for *insufficiency*, which was presented and overruled, would cut off the right to remove (Winkler v. Chicago & E. I. R. Co. 108 Fed. 305-307; Lantz v. Fretts, 173 Fed. 1007, 1008). The hearing and determination of a demurrer in a State court bars the right of removal. Ibid. 1009, and cases cited; Rosenthal v. Coates, 148 U. S. 142, 37 L. ed. 399, 13 Sup. Ct. Rep. 576. Or when defendant files a demurrer and stipulates for a hearing of the cause. Case v. Olney, 106 Fed. 433.

Where one is sued in the State court in the *same* action both upon individual and partnership liability, the appearance in the State court to contest the validity of an attachment affecting his individual liability would not deprive him of the right as a member of the partnership to remove the cause. Calderhead v. Downing, 103 Fed. 27.

#### *Where Action Joint.*

The rule, however, is that when the action is *joint*, and one defendant answers and submits to the jurisdiction of the State court, it deprives the other of the privilege of removing the cause (Ibid.; Abel v. Book, 120 Fed. 47); or one defendant loses his right the other is bound, as where one partner loses the right to remove it subjects the other to the disability. Fletcher v. Hamlet, 116 U. S. 410, 29 L. ed. 680, 6 Sup. Ct. Rep. 426; Rogers v. Van Nortwick, 45 Fed. 514.

#### *To What Term of the Federal Court Case Should Be Removed.*

The next point of observation should be as to whether the record from the State court has been filed at the proper term of the Federal court, and within proper time.

Under section 7 of the act of 1875, 18 Stat. at L. 472, chap. 137, U. S. Comp. Stat. 1901, p. 512, it is provided that all causes removable under this act, if the term of the circuit court to which the same is removable then next to be holden shall commence within twenty days after filing the petition and bond for removal in the State court, then the one seeking to remove has twenty days from such application to file said copy of record in said circuit court and enter appearance there-

in; and if done within said twenty days, such filing an appearance shall be taken to satisfy the bond which requires the record to be filed on the first day of the *next session* of the circuit court of the United States after the removal is sued out. Sec. 7, act 1875; *Goldberg, B. & Co. v. German Ins. Co.* 152 Fed. 831. Under sec. 29, chap. 3 of the New Code, to be effective January 1st, 1912, it is required that a certified copy of the record must be filed within thirty days from the date of filing the petition and bond, and the party removing has thirty days from filing the record to plead, answer, or demur.

A failure to file the record in the Federal court within the time stated does not restore the jurisdiction of the State court (*National S. S. Co. v. Tugman*, 106 U. S. 122, 27 L. ed. 89, 1 Sup. Ct. Rep. 58), but is a cause for remanding the case. U. S. Rev. Stat., sec. 641, U. S. Comp. Stat. 1901, p. 520. *Hatcher v. Wadley*, 84 Fed. 913. However, many exceptions have been recognized, and Federal courts have refused to remand when a reasonable cause for the failure has been set up and proven. *Hatcher v. Wadley*, 84 Fed. 915; *Lucker v. Phoenix Assur. Co.* 66 Fed. 162; *Pierce v. Corrigan*, 77 Fed. 657; *St. Paul & C. R. Co. v. McLean*, 108 U. S. 217, 27 L. ed. 704, 2 Sup. Ct. Rep. 498; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Rowell v. Hill*, 28 Fed. 433; *Eisenmann v. Delemar's Nevada Gold-Min. Co.* 87 Fed. 248. (See "When Not Removed in Time.")

Thus, in *Kelly v. Chicago & S. R. Co.* 122 Fed. 286, the removing defendant awaited the action of the State court upon his application to remove, and was thus delayed until after the time the transcript should have been filed in the Federal court. It was held a reasonable ground, and the court refused to remand the case. So it may be said that a failure to file the record in the Federal court within the statutory time required would be good ground for remanding, if the failure was without reasonable excuse.

Requiring the case to be removed to the *next session* of the circuit court to be held after the petition for removal had been filed created a hardship in Texas where the judicial districts were very large and were divided into several divisions. Whereupon Congress, by act of May 4, 1898, 30 Stat. at L. p. 397, chap. 236, U. S. Comp. Stat. 1901, p. 431, provided that in



case of removal of suits from the court of the State of Texas to the courts of the United States such removal shall be to the circuit court in the division where the county is situated from which the removal is made, and the time within which the removal shall be perfected, in so far as it is regulated by the terms of the United States courts, shall be deemed to refer to the United States courts in such division.

To illustrate: If a case arises in a county attached to the Austin division of the western district, and a removal is sought, it is not necessary to file the record at San Antonio, though that may be the next session of the circuit court of the western district, but you have until the first session of the circuit at Austin to file the record. See *Hyde v. Victoria Land Co.* 125 Fed. 970.

*Transmitting the Record.*

The removing party must transmit the record (*Hatcher v. Wadley*, 84 Fed. 913), but adverse party may file it and move to remand. *Re Newark & H. Traction Co.* 110 Fed. 25. (See *Filing Transcript.*)

*Want of Jurisdiction as a Ground to Remand.*

Our next point of observation would be, did the State court have jurisdiction of the *subject-matter*; for if the court *a quo* had none, the jurisdiction in the Federal court cannot attach by removal, even though the suit could have been originally brought in the Federal court. 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 509; *Thacker Coal & Coke Co. v. Norfolk & W. R. Co.* 171 Fed. 271; *Cowley v. Northern P. R. Co.* 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 127; *Swift & Co. v. Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633, 58 Fed. 858. This question of the State's jurisdiction of the subject-matter may be raised in the Federal court after removal, whereupon the Federal court should dismiss, and not remand. *Auracher v. Omaha & St. L. R. Co.* 102 Fed. 1.

To illustrate: An action in a State court upon some matter exclusively within the jurisdiction of a Federal court, as an action founded upon the violation of the interstate law, is removable, and when removed will be dismissed (*Sheldon v. Wabash R. Co.* 105 Fed. 786; *Swift & Co. v. Philadelphia*

& R. R. Co. 4 Inters. Com. Rep. 633, 58 Fed. 858; Fidelity Trust Co. v. Gill Car Co. 25 Fed. 737; Crowley v. Southern R. Co. 139 Fed. 853, 854), but if the State court had jurisdiction, the fact that defendant pleaded a defense of which the State court could not have taken cognizance would not affect the Federal jurisdiction. Lehigh Valley R. Co. v. Rainey, 99 Fed. 596.

In a limited sense the jurisdiction of the Federal court in removal cases is derivative, so that if the State court had no jurisdiction the Federal court has none. *Ibid.*

*When Case Not Within the Jurisdictional Act.*

We must next look to see if the case in the State court falls within the terms of the Federal jurisdictional act, for if not, it will be remanded. See *Re Cilley*, 58 Fed. 977 for construction of act of 1888.

Removals made on the ground of diversity of citizenship, proper amount, or a Federal question, apparent in the plaintiff's case, touch the fundamental jurisdiction of the Federal court, and, as we have heretofore seen in such cases, it must clearly appear in the petition of plaintiff, if based on a Federal question; or may appear in the petition of plaintiff in the State court, or made to appear in the petition for removal if based on diversity of citizenship. *Harrington v. Great Northern R. Co.* 169 Fed. 714; *Huntington v. Pinney*, 126 Fed. 237, 238; *Johnson v. Wells*, F. Co. 91 Fed. 3; *Ysleta v. Canada*, 67 Fed. 8; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 744; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 814; *Chappell v. Waterworth*, 155 U. S. 107, 39 L. ed. 87, 15 U. S. App. 34; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 841; *Walker v. Collins*, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 738; *Carson v. Dunham*, 121 U. S. 426, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030; *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 311; *Gillespie v. Pocahontas Coal & Coke Co.* 162 Fed. 742; *Willard v. Chicago, B. & Q. R. Co.* 91 C. C. A. 215, 165 Fed. 181. (See "Removal on Diversity of Citizenship," and "On Ground of Federal Question.")

By section 5 of the act of 1875, as we have seen, it is made

the duty of the Federal court to remand the cause at any time after the suit is removed, when it appears that such suit does not involve a dispute or controversy properly within the jurisdiction of the Federal court, or when parties have been collusively joined to make the cause removable (see chapter 92). *Hill v. Walker*, 92 C. C. A. 633, 167 Fed. 241. New Code, chap. 3, sec. 37.

Whenever the cause is removed because of the alleged existence of one of these grounds of jurisdiction, you may make the issue by motion to remand, and contest the truth of the allegation, whether it be of citizenship, amount, or a Federal question.

The issue can only be tried in the Federal court (*Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 448, 46 U. S. App. 630, 77 Fed. 773; *Carson v. Hyatt*, 118 U. S. 287, 30 L. ed. 169, 6 Sup. Ct. Rep. 1050; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 515-517, 30 L. ed. 1160, 1161, 7 Sup. Ct. Rep. 1262; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306), and when raised it must be in the language of the statute, and be proven to the satisfaction of the court that the jurisdiction does not exist, or the case must be remanded. And when shown, it is the duty of the court to remand at any stage of the proceeding where it appears that the cause has been wrongfully removed, though pleading and evidence have been permitted to be filed and taken in the Federal court. *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508. Jurisdiction cannot be inferred by acts of plaintiff or by consent. *Crane Co. v. Guanica Centrale* 132 Fed. 713.

Again, this duty to remand cannot be affected by the fact that there is no apparent cause of action stated, that is for the State court to determine. *Broadway Ins. Co. v. Chicago G. W. R. Co.* 101 Fed. 508; *Ayres v. Wiswall*, 112 U. S. 187-193, 28 L. ed. 693-695, 5 Sup. Ct. Rep. 90; *Evans v. Felton*, 96 Fed. 176.

### *When Question Doubtful Should Remand.*

It is the duty of the court to remand where there is doubt. *Groel v. United Electric Co.* 132 Fed. 265 and cases cited; *Concord Coal Co. v. Haley*, 76 Fed. 882; *Hutcheson v. Bigbee*, 56 Fed. 329.

## CHAPTER CXXV.

### DIVERSITY OF CITIZENSHIP.

When diversity of citizenship is set up as ground for removal it must appear to have existed when the suit began, as well as at the time the application for removal was made; and if it does not so appear, the case should be remanded. *Wilson v. Giberson*, 124 Fed. 701; *Huntington v. Pinney*, 126 Fed. 237; *Freeman v. Butler*, 39 Fed. 1; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Kellam v. Keith*, 144 U. S. 570, 36 L. ed. 544, 12 Sup. Ct. Rep. 922; *Mattingly v. Northwestern Virginia R. Co.* 158 U. S. 56, 39 L. ed. 895, 15 Sup. Ct. Rep. 725; *Oroville & N. R. Co. v. Leggett*, 162 Fed. 572; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 384, 38 L. ed. 204, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 841; *Santa Clara County v. Goldy Mach. Co.* 159 Fed. 750; *Jones v. Adams Exp. Co.* 129 Fed. 618; *Irving v. Smith*, 132 Fed. 207; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 13; *Thompson v. Stalman*, 131 Fed. 809; *Lawrence v. Southern P. Co.* 165 Fed. 241. However, in determining diversity as ground of removal one is not bound by the manner in which parties are placed in the bill, but as has been before shown, the court will place or shift the parties according to their real interest, and if by thus shifting them the proper diversity can be shown the court will not remand. *Hutton v. Joseph Bancroft & S. Co.* 77 Fed. 482; *Groel v. United Electric Co.* 132 Fed. 254; *Harter Twp. v. Kernochan*, 103 U. S. 566-567, 26 L. ed. 412; *Adelbert College v. Toledo, W. & W. R. Co.* 47 Fed. 844.

#### *Indispensable Parties are Alone Considered.*

*Sioux City Terminal R. & Warehouse Co. v. Trust Co. of*

N. A. 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; Cella v. Brown, 136 Fed. 441; Rogers v. Penobscot Min. Co. 83 C. C. A. 380, 154 Fed. 610 and cases cited; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Higgins v. Baltimore & O. R. Co. 99 Fed. 641; Lucas v. Milliken, 139 Fed. 816.

If the bill does not show diversity of citizenship to give jurisdiction, the petition for removal may set up the facts showing diversity of citizenship does exist by shifting the parties according to interest, or by striking out informal parties, or it may set up a collusion and fraudulent joinder of parties by plaintiff in order to prevent removal. Santa Clara County v. Goldy Mach. Co. 159 Fed. 750; Groel v. United Electric Co. 132 Fed. 254; Fife v. Whittell, 102 Fed. 537; Ysleta v. Canda, 67 Fed. 8; Hutton v. Joseph Bancroft & S. Co. 77 Fed. 482; Harter Twp. v. Kernochan, 103 U. S. 566, 567, 26 L. ed. 412, 413; Seaboard Air Line R. Co. v. North Carolina R. Co. 123 Fed. 630; Reese v. Zinn, 103 Fed. 97; Kimball v. Cedar Rapids, 99 Fed. 132.

If neither the bill nor the petition for removal shows jurisdictional facts, the circuit court will not permit an amendment to show jurisdiction and cause for removal, as we shall hereafter see. Fife v. Whittell, 102 Fed. 537; Murphy v. Payette Alluvial Gold Co. 98 Fed. 321; Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co. 89 Fed. 113. Where diversity is alleged but defectively, it may be amended as we will hereafter see. Thompson v. Stalman, 131 Fed. 811; Stadlemann v. Whiteline Towing Co. 92 Fed. 209. (See "Amending Petition for Removal"). Diversity cannot be set up in a petition for removal by stating citizenship of partners, if not made parties to suit as individuals. Ralya Market Co. v. Armour & Co. 102 Fed. 530; see "Amendment of Petition."

### *Fraudulent Joinder to Prevent Removal.*

The circuit court of the United States will not permit plaintiff to join formal parties, or fraudulently join with the de-

fendant parties whose citizenship would defeat a diversity of citizenship and thereby prevent removal. *Free v. Western U. Teleg. Co.* 122 Fed. 311; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286; *Crawford v. Illinois C. R. Co.* 130 Fed. 395 and cases cited; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 86; *Boatner v. American Exp. Co.* 122 Fed. 714; *Ross v. Erie R. Co.* 120 Fed. 703; *McCormick v. Illinois C. R. Co.* 100 Fed. 250; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209; *Axline v. Toledo W. V. & O. R. Co.* 138 Fed. 169; *Offner v. Chicago & E. R. Co.* 78 C. C. A. 359, 148 Fed. 202; *Prince v. Illinois C. R. Co.* 98 Fed. 1; *Doremus v. Root*, 94 Fed. 760; *Dow v. Bradstreet Co.* 46 Fed. 824; See *Charman v. Lake Erie & W. R. Co.* 105 Fed. 449, and *Welch v. Cincinnati, N. O. & T. P. R. Co.* 177 Fed. 760.

### *Fraudulent Joinder to Remove.*

Nor can you fraudulently join a party to create diversity so as to remove. *Pennsylvania R. Co. v. Alleghany Valley R. Co.* 25 Fed. 113. Where the cause of action is joint, you may join a defendant, though the purpose is to prevent removal. *Evansberg v. Insurance Stove, Range & Foundry Co.* 168 Fed. 1001; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 750; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; see *Knuth v. Butte Electric R. Co.* 148 Fed. 73. See "Motion to Remand for Fraudulent Joinder, chapter 133." New Code, chap. 3, sec. 37.

### *Where Issue Determined.*

These issues are to be determined by the Federal court. *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896; *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 70, 47 L. ed. 79, 23 Sup. Ct. Rep. 24; *Woodson County v. Toronto Bank*, 128 Fed. 157; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306; *Arrow-smith v. Nashville & D. R. Co.* 57 Fed. 170; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *McGuire v. Great Northern R. Co.* 153 Fed. 434.

*What Must be Alleged and Shown in Trial of Issue.*

It must appear that no cause of action is stated against the defendant alleged to be fraudulently joined; or that in law he has been improperly joined; or that the averments upon which he is joined are untrue so that a want of good faith in the joinder is apparent. *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745, 746; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, 638; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Offner v. Chicago & E. R. Co.* 78 C. C. A. 359, 148 Fed. 201; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209. General allegations are not sufficient. *Ibid.* See also *Durkee v. Illinois C. R. Co.* 81 Fed. 1; *Landers v. Felton*, 73 Fed. 311. Whether or not an allegation of a joint cause of action in the complaint is true or not may be put in issue by the petition for removal alleging a fraudulent joinder to prevent removal. *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Bryce v. Southern R. Co.* 122 Fed. 709. See *Boatner v. American Exp. Co.* 122 Fed. 714.

*How Issue Raised as to Diversity of Citizenship.*

The issue as to whether there is diversity of citizenship upon which to base the removal is raised in the circuit court of the United States in the same manner as the issue is raised to defeat the original jurisdiction of the circuit courts, which has already been sufficiently discussed, together with the proof required.

If the original bill does not show diversity, and the petition to remove does not specifically set forth facts showing it, then a simple motion to remand can be made. If, however, the petition to remove sets forth facts showing diversity or that by shifting parties diversity would exist, or that there has been a collusion and fraudulent joinder of parties to prevent removal, then the motion to remand must take issue with the allegations of the petition for removal, which issues will be tried in the usual manner or as the court may direct. (See "Shifting Parties.") *Harrington v. Great Northern R. Co.* 169 Fed. 714; *Wetmore v. Rymer*, 169 U. S. 115-119, 42 L. ed. 682-684, 18 Sup. Ct. Rep. 293; *Boatmen's Bank v. Fritzlen*, 66 C. C. A. 288, 135 Fed. 650.

*Removal by Aliens.*

The question arises, Will a motion to remand a cause removed by an alien defendant be granted; or, in other words, can an alien remove a cause on the ground of his alienage?

I will briefly state the result of various cases in which the issue has been raised.

In *Texas v. Lewis*, 12 Fed. 1, in a controversy between a State and an alien defendant the case was held removable.

In 14 Fed. 65, the case was again heard with a similar result. These cases came under the second subdivision of Rev. Stat. 639, which was repealed by the act of 1875, and not re-instated in the act of 1887.

In *Cudahy v. McGeoch*, 37 Fed. 1, it is held that an alien sued in the State of his residence by citizens of another State cannot remove the case to the Federal court under the act of 1887. The ground was that the suit was not a suit between citizens of different States; and, secondly, that, though it was a suit between a citizen of a State and a foreign citizen, yet the foreign citizen was a resident of the State in which he was sued, and therefore did not come within the provisions of the removal act permitting only nonresident citizens to remove. *King v. Cornell*, 106 U. S. 398, 27 L. ed. 61, 1 Sup. Ct. Rep. 313; *Walker v. O'Neil*, 38 Fed. 375; *Eddy v. Casas*, 118 Fed. 363.

By an examination of the act of 1888, section 2, affecting removals, two restrictions are attached to removals from a State to Federal courts: First. Removals are limited to cases in which the United States circuit court has original jurisdiction under section 1 of the act; and, second, the right to remove is limited to a *nonresident* defendant.

Now, by the first section of the act, jurisdiction is given to the circuit courts when the controversy is between a citizen of a State and foreign State citizens or subjects.

So, a citizen may sue an alien in the Federal court in the first instance, but if the alien should be sued in the State court his right to remove depends upon the second limitation as above stated, to wit, he must be a *nonresident* of the State in which he is sued to remove the case to the Federal court; otherwise he cannot remove, and a motion to remand will be granted. *Ibid.*; *Cooley v. McArthur*, 35 Fed. 372; *Baumgarten v. Alliance*



Assur. Co. 153 Fed. 301; *Holton v. Helvetia-Swiss F. Ins. Co.* 163 Fed. 660.

But the question has arisen, Can a suit be removed from a State court in which a citizen of the State where the suit is brought has sued a nonresident citizen and alien jointly and both joining in the petition for removal? This identical question was raised in *Roberts v. Pacific & A. R. & Nav. Co.* 58 C. C. A. 61, 121 Fed. 785, and it was held that the suit could be removed, but it will be noticed that the conclusion of the court was based on the ground that both the citizen and alien were nonresidents of the State in which the suit was brought, and if each had been sued separately could remove. But had the alien been a resident of the State, no removal could have been had unless the controversy was separable as to the nonresident citizen. This case repudiates the doctrine in *Black's Dillon on Removals*, secs. 68, 84, and seeks to avoid. *Tracy v. Morel*, 88 Fed. 803, and *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 313, referred to below, and minimizes the force of the word "wholly" in the act of 1888, sec. 2. However, an action by a nonresident against a citizen of the State, and alien is not removable. *Hackett v. Kuhne*, 157 Fed. 317, citing *Martin v. Snyder*, 148 U. S. 663, 37 L. ed. 602, 13 Sup. Ct. Rep. 706.

Another question arises, to wit: Can a suit be removed by an alien sued jointly with a citizen of a State on the ground that the controversy with the alien is separable? In *Insurance Co. of N. A. v. Delaware Mut. Ins. Co.* 50 Fed. 257, the question is stated as a query, with the intimation by the court that the language of the act of 1887 entitled him to remove the cause if he be a nonresident alien. It says the test is actual interest in the separable controversy. In *Creagh v. Equitable Life Assur. Soc.* 88 Fed. 2, it is held that the statute limits removals in a separable controversy to cases where it is *wholly* between citizens of different States, and an alien who is a party to a separable controversy can not remove, and conversely a nonresident defendant cannot remove, a separable controversy with an alien plaintiff. *Tracy v. Morel*, 88 Fed. 803, citing *King v. Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 313; *Merchants' Cotton Press & Storage Co. v. Insurance*  
S. Eq.—52.

Co. of N. A. 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367; Woodrum v. Clay, 33 Fed. 899; See Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 447.

So the rules may be stated:

First. That where an alien is sued alone in a State in which he does not reside, he may remove the cause to the Federal court as a "nonresident" defendant.

Second. That when an alien is sued jointly with a resident defendant in a State court, he cannot remove on the ground of a separate controversy, because the statute only permits a removal on the ground that the separable controversy must be *wholly* between citizens of different States.

Third. That in view of this act a *separable* controversy between an alien plaintiff and a nonresident defendant cannot be removed by the nonresident defendant.

Fourth. In view of the decision in Roberts v. Pacific & A. R. Co. 58 C. C. A. 61, 121 Fed. 785, if an alien is joined with a nonresident defendant, either of whom could remove if sued separately, then both may join in a removal to the Federal court. If, however, the alien joined with the nonresident defendant was a resident of the State in which he is sued, the case could not be removed.

Fifth. Where alien sues nonresident the latter may remove. Iowa Lillooet Gold Min. Co. v. Bliss, 144 Fed. 447; Barlow v. Chicago & N. W. R. Co. 164 Fed. 765; S. C. 172 Fed. 514-516; Bagenas v. Southern P. R. Co. 180 Fed. 888.

Suit brought by an alien against an officer of the United States being a nonresident of that State in which suit is brought may be removed into the district court in the district in which the defendant was served. New Code, sec. 34.

### *Removal by Corporations.*

Corporations are citizens of the State granting their charters, which determines citizenship in removals. Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Lee v. Atlantic Coast Line R. Co. 150 Fed. 776. See Patch v. Wabash R. Co. 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80, 12 A. & E. Ann. Cas. 518; Wasley v. Chicago, R. I. & P. R. Co. 147 Fed. 608.

*Who Can Remove the Case in Diversity of Citizenship.*

When jurisdiction is based on diversity of citizenship, then the nonresident defendant may remove, or when more than one defendant, then all nonresident defendants *concurring* may remove (chap. 2 sec. 2, act 1888; *State Trust Co. v. Kansas City P. & G. R. Co.* 110 Fed. 10; *Houston v. Filer & S. Co.* 43 C. C. A. 457, 104 Fed. 162, and cases cited; *Huntington v. Pinney*, 126 Fed. 237; *Blackburn v. Blackburn*, 142 Fed. 901; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 248, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 337, 45 L. ed. 221, 21 Sup. Ct. Rep. 171; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 182; *Parkinson v. Barr*, 105 Fed. 83, 84; *Thompson v. Chicago, St. P. & K. C. R. Co.* 60 Fed. 773; See *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 789, defining "nonresident" as used in the statute), and by the word "concurring" is meant that they must join in the petition for removal (*Ibid.*; *Yarnell v. Felton*, 104 Fed. 161, S. C. 102 Fed. 369), and the petition must show all the defendants are nonresidents and concur in the application (*Parkinson v. Barr*, 105 Fed. 83, 84; *Bates v. Carpentier*, 98 Fed. 452), unless cause separable.

It is held, however, in *First Nat. Bank v. Bridgeport Trust Co.* 117 Fed. 969, that the failure of the husband to join where the subject-matter of the litigation was the wife's interest in property was immaterial, and where one is only a nominal defendant against whom no relief is prayed his failure to join in the application will not affect the removal. *Henderson v. Cabell*, 43 Fed. 257. See "Nominal Party."

There can be no removal on the ground of diversity of citizenship when the State is a party (*Postal Teleg. Cable Co. v. United States* [*Postal Teleg. Cable Co. v. Alabama*] 155 U. S. 482, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Indiana use of Delaware County v. Alleghany Oil Co.* 85 Fed. 870; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 520, 42 L. ed. 1130, 18 Sup. Ct. Rep. 685; *Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs.* [*Missouri, K. & T. R. Co. v. Hickman*] 183 U. S. 58, 46 L. ed. 80, 22 Sup. Ct. Rep. 18); nor when a nonresident is suing a nonresident in ~~State~~

court (*Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150), unless the plaintiff assents (*Moyer v. Chicago, M. & St. P. R. Co.* 168 Fed. 105); but if removed, the objection is waived (*Kreigh v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 14 A. & E. Ann. Cas. 1164; *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720). See chapter 128.

### *Joinder of Defendants Not Served.*

When the cause of action in which a defendant not served is joint, the nonresident served cannot remove as if a separable controversy (*Patchin v. Hunter*, 38 Fed. 51; *Ames v. Chicago, S. F. & C. R. Co.* 39 Fed. 881. See *Putnam v. Ingraham*, 114 U. S. 59, 29 L. ed. 66, 5 Sup. Ct. Rep. 746; *Wilson v. Oswego Twp.* 151 U. S. 66, 38 L. ed. 75, 14 Sup. Ct. Rep. 259; *Sinclair v. Pierce*, 50 Fed. 852; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896), unless there is an allegation of fraudulent joinder and no issue joined, says the court in *Dishon v. Cincinnati, N. D. & T. P. R. Co.* 133 Fed. 471; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209. See "Effect of Removal on Service in State Court."

In *Tremper v. Schwabacher*, 84 Fed. 415, the case rested upon the fact that the nature of the joint interest was one of copartnership, and therefore held that the other partners not being served would not prevent a removal by the nonresident partner served. *Diday v. New York, P. & O. R. Co.* 107 Fed. 569. If, however, it is removed and tried without objection, a severance will be presumed. *Guarantee Co. v. Mechanics Sav. Bank & T. Co.* 26 C. C. A. 146, 47 U. S. App. 91, 80 Fed. 766.

If one joint defendant loses the right to remove, it cannot be exercised by the others in the absence of a separable controversy. *Calderhead v. Downing*, 103 Fed. 27; *Fletcher v. Hamlet*, 116 U. S. 410, 29 L. ed. 679, 6 Sup. Ct. Rep. 426; *Brooks v. Clark*, 119 U. S. 513, 30 L. ed. 485, 7 Sup. Ct. Rep. 301; *Abel v. Book*, 120 Fed. 47; *Rogers v. Van Nortwick*, 45 Fed. 514.

*Misjoinder.*

Where there is a misjoinder of parties their presence may be disregarded in removal. *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 447; *Politz v. Wabash R. Co.* 153 Fed. 942; *S. C. 100 C. C. A. 1*, 176 Fed. 333; *Helms v. Northern P. R. Co.* 120 Fed. 395.

*Nominal Parties.*

Nominal parties, or parties against whom no relief is prayed, need not join in applying for removal, or it may be stated their failure to join in the petition for removal would not affect it (*Reeves v. Corning*, 51 Fed. 778; *Johnston R. Frog & Switch Co. v. Buda Foundry & Mfg. Co.* 148 Fed. 883; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 742; *Reese v. Zinn*, 103 Fed. 97; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *First Nat. Bank v. Bridgeport Trust Co.* 117 Fed. 969; *Loop v. Winters*, 115 Fed. 362; *Rogers v. Penobscot Min. Co.* 83 C. C. A. 380, 154 Fed. 606, 607; *Parkinson v. Barr*, 105 Fed. 81; *Higgins v. Baltimore & O. R. Co.* 99 Fed. 640; *Geer v. Mathieson Alkali Works*, 190 U. S. 434, 47 L. ed. 1125, 23 Sup. Ct. Rep. 807; *Carver v. Jarvis-Conklin Mortg. Trust Co.* 73 Fed. 9; *Missouri use of Public Schools v. Alt*, 73 Fed. 302), as when defendant has only an option (*Garrard v. Silver Peak Mines*, 76 Fed. 1).

*When Controversy Separable.*

While the rule, as given, that all the nonresident defendants must join the removal, or the court will remand (*Bates v. Carpentier*, 98 Fed. 453; *Moore v. Los Angeles Iron & Steel Co.* 89 Fed. 78; *Colburn v. Hill*, 41 C. C. A. 467, 101 Fed. 500; *Knight v. Lutchter & M. Lumber Co.* 69 C. C. A. 248, 136 Fed. 405—separate defenses, as we have heretofore seen, do not create a separable controversy—*Graves v. Corbin*, 132 U. S. 588, 33 L. ed. 468, 10 Sup. Ct. Rep. 196; *Fidelity Ins. Trust & S. D. Co. v. Huntington*, 117 U. S. 281, 29 L. ed. 899, 6 Sup. Ct. Rep. 733; *Thurber v. Miller*, 14 C. C. A. 432, 32 U. S. App. 209, 67 Fed. 375; *Torrence v. Shedd*, 144 U. S.

530, 36 L. ed. 531, 12 Sup. Ct. Rep. 726), yet the rule is not applicable if there be a separable controversy between plaintiffs and one or more of the defendants, as heretofore explained; the nonresident defendant having the separate controversy may remove the case. *Parkinson v. Barr*, 105 Fed. 83, 84, and authorities cited; see clause 3, sec. 2, act 1888; *Bates v. Carpenter*, 98 Fed. 452; *New England Waterworks Co. v. Farmers' Loan & T. Co.* 69 C. C. A. 297, 136 Fed. 525; *Chicago, R. & P. R. Co. v. Martin*, 178 U. S. 247, 44 L. ed. 1056, 20 Sup. Ct. Rep. 854; *Laden v. Meck*, 65 C. C. A. 361, 130 Fed. 877; *American Bridge Co. v. Hunt*, 64 C. C. A. 548, 130 Fed. 303; *Harding v. Standard Oil Co.* 170 Fed. 651; *Batey v. Nashville, C. & St. L. R. Co.* 95 Fed. 368.

In equity the question of the existence of a separable controversy must be determined from the allegations of the bill, independent of the petition for removal. *Elkins v. Howell*, 140 Fed. 157, 159 and cases cited. *Graves v. Corbin*, 132 U. S. 585, 33 L. ed. 467, 10 Sup. Ct. Rep. 196. So also in tort. See *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 171; *Blunt v. Southern R. Co.* 155 Fed. 500; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *Fogarty v. Southern P. Co.* 123 Fed. 973, 974.

To avoid repetition I must refer you to the discussion of a separable controversy and illustrative cases, as they apply to removal of causes as stated in the act of 1888, sec. 2. See for illustration *Miller v. Clifford*, 5 L.R.A.(N.S.) 49, 67 C. C. A. 52, 133 Fed. 881; *Oroville & N. R. Co. v. Leggett*, 162 Fed. 572; *Manufacturers' Commercial Co. v. Brown Alaska Co.* 148 Fed. 308; *Elkins v. Howell*, 140 Fed. 157; *Heffelfinger v. Choctaw, A. & G. R. Co.* 140 Fed. 75; *Blackburn v. Blackburn*, 142 Fed. 901; *Lathrop, S. & H. Co. v. Interior Constr. & Improv. Co.* 143 Fed. 687; *Helena Power Transmission Co. v. Spratt*, 146 Fed. 311; *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Peninsular Iron Co. v. Stone*, 121 U. S. 632, 633, 30 L. ed. 1020, 1021, 7 Sup. Ct. Rep. 1010; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; *Mac Ginniss v. Boston & M. Consol. Copper & S. Min. Co.* 55 C. C. A. 648, 119

Fed. 96; *Hanover Nat. Bank v. Credits Commutation Co.* 118 Fed. 110; *State Trust Co. v. Kansas City, P. & G. R. Co.* 110 Fed. 10; *German Sav. & L. Soc. v. Dormitzer*, 53 C. C. A. 639, 116 Fed. 471; *Miller v. LeMars Nat. Bank*, 116 Fed. 551.

Where the case is removed by one defendant on the ground of a separable controversy, you may dismiss as to him in order to remand the case. *Youtsey v. Hoffman*, 108 Fed. 699; *McCabe v. Southern R. Co.* 107 Fed. 213; *Texas Transp. Co. v. Seeligson*, 122 U. S. 519, 30 L. ed. 1150, 7 Sup. Ct. Rep. 1261; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 726; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183.

An alien, as we have seen, cannot remove on the ground of a separable controversy. (See "Removal by Aliens.")

### *Tort Feasors.*

Where tort feasors are joined, one cannot remove on the ground of a separable controversy. *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Blunt v. Southern R. Co.* 155 Fed. 499; *Shaffer v. Union Brick Co.* 128 Fed. 101; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 85; *Dougherty v. Atchison, T. & S. F. R. Co.* 126 Fed. 240; *Keller v. Kansas City, St. L. & C. R. Co.* 135 Fed. 202; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 452; *Knuth v. Butte Electric R. Co.* 148 Fed. 73; *Alabama, G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *American Bridge Co. v. Hunt*, 64 C. C. A. 548, 130 Fed. 302; *International & G. N. R. Co. v. Hoyle*, 79 C. C. A. 128, 149 Fed. 181; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 960; *Person v. Illinois C. R. Co.* 118 Fed. 342; *Williard v. Spartanburg, U. & C. R. Co.* 124 Fed. 797; *Weaver v. Northern P. R. Co.* 125 Fed. 155; *Marrs v. Felton*, 102 Fed. 775; *Ward v. Franklin*, 110 Fed. 794; *Rupp v. Wheeling & L. E. R. Co.* 58 C. C. A. 161, 121 Fed. 825; *Willard v. Chicago, B. & Q. R. Co.* 91 C. C. A. 215, 165 Fed. 181. The separable controversy must be determined by the face of the pleading. *Thresher v. Western U. Teleg. Co.* 148 Fed. 651; *Fogarty v. Southern P. Co.* 123 Fed. 973,

974; *Riser v. Southern R. Co.* 116 Fed. 215. But where a corporation sues for damages alleged to have been sustained by the corporation by reason of the officers' misconduct, and no conspiracy is alleged, the action is severable. *Sessions v. Southern P. Co.* 134 Fed. 313; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 962, and cases cited; *Youtsey v. Hoffman*, 108 Fed. 693.

Again, where two corporations are sued for a personal injury from falling down an elevator, one being sued as owner of the building and the other as having negligently built the elevator, it was held the cause was separable. *Coker v. Monaghan Mills*, 110 Fed. 803.

So it has been held that a joint action cannot be maintained against a railroad company and an employer to recover for an injury resulting solely from the negligence of the employee; the causes of action, being based on separate grounds, are distinct, and present a separable controversy. *Helms v. Northern P. R. Co.* 120 Fed. 389; *Sessions v. Southern P. Co.* 134 Fed. 313; *Chicago, R. I. & P. R. Co. v. Stepp*, 151 Fed. 909; *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. 891; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 87, 88; See *Knuth v. Butte Electric R. Co.* 148 Fed. 73; See *Morris v. Louisville & N. R. Co.* 175 Fed. 491.

By referring to *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, 643, it will be seen that up to the date of its delivery the authorities were conflicting, and it seems that the cases have been differentiated and a rule of construction applied to determine when the controversy in an action against the employer and employee for a personal injury can be made separable.

The rule is that in all cases where the master is sought to be made liable for the negligent or wrongful act of his servant solely on the ground of his relationship as master, under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act by his presence, or express direction, he is liable severally only, and not jointly with his servant. *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 641, 642; *Sessions v. Southern P. Co.* 134 Fed. 315; *Gustafson v. Chicago, R. I. & P. R. Co.* 128 Fed. 93-96; *Shaffer v. Union Brick Co.* 128 Fed. 102; See *Dishon v.*



Cincinnati, N. O. & T. P. R. Co. 66 C. C. A. 345, 133 Fed. 474; and Charman v. Lake Erie & W. R. Co. 105 Fed. 454; Adderson v. Southern R. Co. 177 Fed. 571.

There must be some community in the wrong doing among the parties united as codefendants, and a co-operation in fact, and not a mere joint responsibility and based on entirely different grounds and presenting two causes of action in the same complaint. Helms v. Northern P. R. Co. 120 Fed. 394; Shaffer v. Union Brick Co. 128 Fed. 101. See Knuth v. Butte Electric R. Co. 148 Fed. 73; Davenport v. Southern R. Co. 68 C. C. A. 444, 135 Fed. 967. As to the rule when the law of the State permits it, see Charman v. Lake Erie & W. R. Co. 105 Fed. 449, 454; Helms v. Northern P. R. Co. 120 Fed. 397, 398.

Again, it has been held that the employee is not liable to third persons for a *nonperformance* of duty, but only for acts of positive wrong and negligence; thus, an employee charged with the inspection of engines cannot be joined with the company as defendant, so as to prevent a removal of the cause to the Federal court. Ibid.; Kelly v. Chicago & A. R. Co. 122 Fed. 286. See Helms v. Northern P. R. Co. 120 Fed. 396, 397. See Riser v. Southern R. Co. 116 Fed. 216, 217, citing Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67 (See "Joint and Several Liability").

### *The Whole Case is Removed.*

When a case is removed on the ground of a separable controversy, the whole case under the act of 1875 is taken up. Barney v. Latham, 103 U. S. 212-216, 26 L. ed. 517-518; Hoge v. Canton Ins. Office, 103 Fed. 513; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823; Atlantic & V. Fertilizing Co. v. Carter, 88 Fed. 708; Brooks v. Clark, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; See Youtsey v. Hoffman, 108 Fed. 699. The case would be remanded if only the separable controversy was taken up. U. S. Rev. Stat. § 639, act of 1866 was repealed by the act of 1875; Hyde v. Ruble, 104 U. S. 407, 26 L. ed. 823. See Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co. 152 Fed. 830, 831, where a distinction is drawn between a "separate controversy"

and the joinder of wholly distinct causes of action; in the latter case the rule does not apply.

*Substance of Petition to Remove.*

The petition to remove on the ground of separable controversy must show that there is in said suit a controversy wholly between citizens of different States, and which can be fully determined as between them. It should show the citizenship clearly, and not by inference, of the parties between whom the separable controversy exists. It should be determined by the condition of the record in the State court at the time of filing the petition for removal. *Thomas v. Great Northern R. Co.* 77 C. C. A. 255, 147 Fed. 83; *Davenport v. Southern R. Co.* 68 C. C. A. 444, 135 Fed. 965, 966; *Carp v. Queen Ins. Co.* 168 Fed. 782; *Alexandria Nat. Bank v. Willis C. Bates Co.* 87 C. C. A. 643, 160 Fed. 839; *Jones v. Adams Exp. Co.* 129 Fed. 618; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Thompson v. Stalman*, 131 Fed. 811. See *Elkins v. Howell*, 140 Fed. 157, holding that in a suit in equity the separable controversy must be determined from the bill alone. *Atlanta, K. & N. R. Co. v. Southern R. Co.* 82 C. C. A. 256, 153 Fed. 122, 11 A. & E. Ann. Cas. 766.

It should show the nature of the controversy, and that the relief asked as between the parties to the separable controversy would not affect the others; in a word, that in the issue only petitioner and plaintiff are interested, and then should follow a prayer for removal. *Smedley v. Smedley*, 110 Fed. 257.

It must speak in exact language of the removal act (*Barth v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, 60 Fed. 469), in using the words "citizen," "resident" and "inhabitant." *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578; *Freeman v. Butler*, 39 Fed. 1.

If, however, the separable controversy is settled by stipulations, the cause should be remanded. *Bane v. Keefer*, 66 Fed. 612; *Torrence v. Shedd*, 144 U. S. 533, 36 L. ed. 532; 12 Sup. Ct. Rep. 726. Need not be verified. *Harley v. Home Ins. Co.* 125 Fed. 792. See for form, 110 Fed. 257.

## CHAPTER CXXVI.

### REMOVAL ON GROUND OF FEDERAL QUESTION.

When a Federal question is set up, upon which the removal is based, the mere allegation in the petition that a Federal question exists is not sufficient. The plaintiff's claim as set forth by himself must also show the Federal question, for if the court cannot find the Federal question in the statements of the claim made, it must remand without reference to the allegation that one exists. Nor can any statement in the *petition for removal* or in any subsequent pleading help the case, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 509; *People's United States Bank v. Goodwin*, 160 Fed. 727; *Oregon v. Three Sisters Irrig. Co.* 158 Fed. 346; *Hall v. Chicago, R. I. & P. R. Co.* 149 Fed. 564; *Cella v. Brown*, 75 C. C. A. 608, 144 Fed. 763; *Arkansas v. Choctaw & M. R. Co.* 134 Fed. 107; *Dewey Min. Co. v. Miller*, 96 Fed. 1; *California Oil & Gas Co. v. Miller*, 96 Fed. 12; *New Castle v. Postal Teleg. Cable Co.* 152 Fed. 572, 573; *Broadway Ins. Co. v. Chicago, G. W. R. Co.* 101 Fed. 508; *Mayo v. Dockery*, 108 Fed. 897; *South Carolina v. Virginia-Carolina Chemical Co.* 117 Fed. 728; *Wichita v. Missouri & K. Teleg. Co.* 122 Fed. 100; *Minnesota v. Northern Securities Co.* 194 U. S. 64, 48 L. ed. 878, 24 Sup. Ct. Rep. 598; *Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama)* 155 U. S. 482-487, 39 L. ed. 231-233, 15 Sup. Ct. Rep. 192; *Pratt v. Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; *Caples v. Texas & P. R. Co.* 67 Fed. 9. (See "How Federal Question Must Appear," chapter 28.) And it seems the State court may refuse to remove the case on this ground. *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 235, 42 L. ed. 1020, 18 Sup. Ct. Rep. 603.

However, it seems that there is a class of cases when the Federal question may be set up in the petition to remove the case, as when the petition fails to assert the fact that would give the Federal court jurisdiction, in order to evade the juris-

diction of these courts. *Texas & P. R. Co. v. Cody*, 166 U. S. 610, 41 L. ed. 1134, 17 Sup. Ct. Rep. 703; *Texas & P. R. Co. v. Davis*, 93 Tex. 378, 54 S. W. 383, 55 S. W. 562; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 181. See *Winters v. Drake*, 102 Fed. 545, as to proper application of the rule permitting removal though Federal question does not appear in the bill.

When the corporation is acting under a Federal charter and the petition fails to allege it. *Ibid.*; *Martin v. St. Louis Southwestern R. Co.* 134 Fed. 135, and cases cited. *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 180; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 180; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75 (see "Corporations Chartered by Congress" chapter, 25). If there are two corporation defendants, one chartered by Congress and the other not, both must join in the application for removal. *Ibid.*

Nor will a mere attack on a State statute make a case under the removal act. *Ralya Market Co. v. Armour & Co.* 102 Fed. 530; see "Federal Question" for further discussion.

Where the Supreme Court has decided the particular question of law upon which the suit is based, it ceases to be a Federal question for removal purposes. *Myrtle v. Nevada, C. & O. R. Co.* 137 Fed. 195, 196, and cases cited.

### *Who May Remove on Ground of Federal Question.*

The defendant or *all* of the defendants *concurring* must make the application (sec. 1, clause 1, act of 1888; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; explains and modifies *Mitchell v. Smale*, 140 U. S. 406, 55 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Martin v. St. Louis, Southwestern R. Co.* 134 Fed. 135, 136; *Yarnell v. Felton*, 104 Fed. 161, S. C. 102 Fed. 369; *Scott v. Choctaw, O. & G. R. Co.* 112 Fed. 180-182; *Heffelfinger v. Choctaw, O. & G. R. Co.* 140 Fed. 75), unless, as before stated, the controversy with the moving defendant is separable, then the application need not be joint (*Yarnell v. Felton*, 102 Fed. 370; *Parkinson v. Barr*, 105 Fed. 83; *Gates Iron Works v. James E. Pepper & Co.* 98 Fed. 449).

## CHAPTER CXXVII.

### AMOUNT AS GROUND FOR MOTION TO REMAND.

We have seen that one of the fundamental grounds of jurisdiction in the Federal courts is the amount or value of the subject-matter in controversy, and this must appear in the petition of plaintiffs, or in the application for removal (*Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* 89 Fed. 113; *Order of R. R. Telegraphers v. Louisville & N. R. Co.* 148 Fed. 437; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578-582; *King v. Southern R. Co.* 119 Fed. 1016; *Southern Cash Register Co. v. National Cash Register Co.* 143 Fed. 659; *Southern Cash Register Co. v. Montgomery*, 143 Fed. 700; *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 137. See *Porter v. Northern P. R. Co.* 161 Fed. 773, 774, and *Davis v. Wells*, 134 Fed. 139, as to value in action of ejectment. *Johnson v. Wells, F. & Co.* 91 Fed. 1; *Daugherty v. Sharp*, 171 Fed. 466; *New Castle v. Western U. Teleg. Co.* 152 Fed. 571; *Simmons v. Mutual Reserve Fund Life Asso.* 114 Fed. 785; *Lord v. DeWitt*, 116 Fed. 713; *Baltimore v. Postal Teleg. Cable Co.* 62 Fed. 500; *Western U. Teleg. Co. v. White*, 102 Fed. 705; see "Amount to Give Jurisdiction"), and as alleged is sufficient if not colorable (*Ibid.*; *Hayward v. Nordberg Mfg. Co.* 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4; *Wakeman v. Throckmorton*, 124 Fed. 1010; See *Smith v. Western U. Teleg. Co.* 79 Fed. 132).

The amount or value in controversy must exceed two thousand dollars, exclusive of interest and costs (act 1888, sec. 1), or the case cannot be removed to the Federal court (*Johnson v. Wells, F. & Co.* 91 Fed. 1; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; *Simmons v. Mutual Reserve Fund Life Asso.* 114 Fed. 785; *Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232; *E. A.*

Holmes & Co. v. United States F. Ins. Co. 142 Fed. 863; Memphis v. Postal Teleg. Cable Co. 76 C. C. A. 292, 145 Fed. 602; Amelia Mill Co. v. Tennessee Coal, Iron & R. Co. 123 Fed. 811; Chambers v. McDougal, 42 Fed. 694; Stadlermann v. White Line Towing Co. 92 Fed. 209; Langdon v. Hillside Coal & I. Co. 41 Fed. 609; Detroit v. Detroit City R. Co. 54 Fed. 5), whether jurisdiction is based on diversity of citizenship or a Federal question, and the amount must be determined by the Federal court (Postal Teleg. Cable Co. v. Southern R. Co. 88 Fed. 803), and the burden is on the defendant. New Castle v. Western U. Teleg. Co. 152 Fed. 569.

The amount, at the time of filing the application to remove, must exceed two thousand dollars, as above stated (Riggs v. Clark, 18 C. C. A. 242, 37 U. S. App. 626, 71 Fed. 563; Maine v. Gilman, 11 Fed. 214; Carrick v. Landman, 20 Fed. 209; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co. 89 Fed. 113; Western U. Teleg. Co. v. Campbell, 41 Tex. Civ. App. 204, 91 S. W. 312); but the question arises how far the plaintiff in the State court can diminish the amount to prevent removal.

Whatever may have been the original demand, the plaintiff can diminish the amount before the bond perfecting the application for removal has been filed, and his motive does not affect his right. Maine v. Gilman, 11 Fed. 215, 216; Coffin v. Philadelphia, W. & B. R. Co. 118 Fed. 688. However in Peterson v. Chicago, M. & St. P. R. Co. 108 Fed. 561, it was held that where the original petition in the State court was based on a claim of ten thousand dollars, but was amended, reducing the amount to nineteen hundred and ninety-nine dollars, and the amendment was not served as required by the State law, before the application for removal was filed, that this reducing the amount by amendment would not prevent the removal. The decision, however, is extremely technical, and not supported by reason in view of the facts of the case.

After the petition and bond for removal has been filed the jurisdiction of the Federal court attaches, and plaintiff cannot diminish his demand to defeat the Federal jurisdiction. Johnson v. Computing Scale Co. 139 Fed. 339; Hayward v. Nordberg Mfg. Co. 29 C. C. A. 438, 54 U. S. App. 639, 85 Fed. 4-9; Donovan v. Dixieland Amusement Co. 152 Fed. 661;

*Coffin v. Philadelphia, W. & B. R. Co.* 118 Fed. 688; *Waite v. Phoenix Ins. Co.* 62 Fed. 769. The claim made at the time the removal takes place determines the jurisdiction for removal, but see exception to the rule, *Hughes v. Pepper Tobacco Warehouse Co.* 126 Fed. 687, where mistake in stating amount was shown. The fact that the amount is reduced below two thousand dollars by an attack on items would be no ground to remand, unless good faith attacked. *Roessler-Hasslach Chemical Co. v. Doyle*, 73 C. C. A. 174, 142 Fed. 118; *Leviniski v. Middlesex Bkg. Co.* 34 C. C. A. 452, 92 Fed. 449. The party removing cannot attack amount to show want of jurisdiction. *Smith v. Western U. Teleg. Co.* 79 Fed. 132; *Eustis v. Henrietta*, 20 C. C. A. 537, 41 U. S. App. 182, 74 Fed. 577.

### *Effect of Filing Counterclaim.*

The jurisdiction depends on the amount in controversy, as stated in the original petition in the State court, and not the counterclaim of the defendant, is said to be the rule in *Illinois C. R. Co. v. Waller*, 164 Fed. 359; *Falls Wire Mfg. Co. v. Broderick*, 2 McCrary, 489, 6 Fed. 654; *Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co.* 135 Fed. 837; *La Montagne v. T. W. Harvey Lumber Co.* 44 Fed. 645; *Bennett v. Devine*, 45 Fed. 705; *McKown v. Kansas & T. Coal Co.* 105 Fed. 657; *Waco Hardware Co. v. Michigan Stove Co.* 33 C. C. A. 511, 63 U. S. App. 396, 91 Fed. 289. But it was held *contra* in *Clarkson v. Manson*, 18 Blatchf. 443, 4 Fed. 257. *Price v. Ellis*, 129 Fed. 482, reviewing the cases and concluding that the plaintiff may remove at and before the time he is called to plead to the counterclaim. The cases are conflicting and irreconcilable, but the better rule is that the original petition fixes the amount upon which jurisdiction to remove depends. Nor can the nonresident plaintiff, being defendant in the counterclaim, remove, *McKown v. Kansas, & T. Coal Co.* 105 Fed. 658. However, the query is presented in this case, whether the right of the nonresident plaintiff to remove would not exist, if under the State law he was required to plead to a counterclaim.

## CHAPTER CXXVIII.

### MUST BE A SUIT OF A CIVIL NATURE.

As to what is a suit of a civil nature, was said in *Weston v. Charleston*, 2 Pet. 449-464, 7 L. ed. 481-487, to apply to any proceeding in which one pursues in a court of justice a remedy which the law gives him to secure the right litigated. *Re Jarnecke Ditch*, 69 Fed. 166. *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 140; *Upshur County v. Rich*, 135 U. S. 474, 34 L. ed. 199, 10 Sup. Ct. Rep. 651; *Re Stutsman County*, 88 Fed. 337; *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 682; *Gruetter v. Cumberland Teleph. & Teleg. Co.* 181 Fed. 249; *Elk Garden Co. v. T. W. Thayer Co.* 179 Fed. 556.

Proceedings in garnishment is a removable suit. *Baker v. Duwamish Mill Co.* 149 Fed. 612. Suit for condemnation is a suit of a civil nature. *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 790, 791, and cases cited; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206. So is a claim for alimony. *Israel v. Israel*, 130 Fed. 238, 239, and cases cited.

Again, a suit to probate a will has been held not to be a suit of a civil nature within the meaning of the first section of the act of 1888, and therefore cannot be removed. (See "Probate Jurisdiction," chapter 43). *Wahl v. Franz*, 49 L.R.A. 62, 40 C. C. A. 638, 100 Fed. 683; *Re Cilley*, 58 Fed. 977; *Copeland v. Bruning*, 72 Fed. 5-8; *Re Aspinwall*, 83 Fed. 851.

So a suit or proceeding in a probate court to determine whether property is separate or community is not a suit of a civil nature within the removal act. *Re Foley*, 80 Fed. 949. But not a suit to annul a will as a muniment of title. *Sawyer v. White*, 58 C. C. A. 587, 122 Fed. 227, and cases cited. So a suit to enforce penalties for a violation of a "State statute is not a suit of a civil nature. *Indiana use of Delaware*



County v. Alleghany Oil Co. 85 Fed. 870; Arkansas v. St. Louis & S. F. R. Co. 173 Fed. 574; South Carolina v. Virginia Chemical Co. 117 Fed. 727, 728; Moloney v. American Tobacco Co. 72 Fed. 801. So a proceeding for an original writ of mandamus is not. Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 3; Mystic Milling Co. v. Chicago, M. & St. P. R. Co. 132 Fed. 289. So to test the title to an office in a corporation organized in a State. Place v. Illinois, 16 C. C. A. 300, 18 U. S. App. 724, 69 Fed. 481. So an appeal from board of commissioners assessing taxes. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co. 158 Fed. 140, 141; Upshur County v. Rich, 135 U. S. 470-477, 34 L. ed. 197-200, 10 Sup. Ct. Rep. 651; Re Chicago, 64 Fed. 899. So a Federal Court cannot exercise the function of *parens patriæ* for the determination of the right to custody, as, for instance, an insane person. Hoadly v. Chase, 126 Fed. 818. This authority resides in the States. Church of Jesus Christ of L. D. S. v. United States, 136 U. S. 3, 34 L. ed. 478, 10 Sup. Ct. Rep. 792; Fountain v. Ravenel, 17 How. 369-384, 15 L. ed. 80-86; King v. McLean Asylum, 26 L.R.A. 784, 12 C. C. A. 145, 21 U. S. App. 481, 64 Fed. 351. Nor where the suit deals with a fund in a State court. Daugherty v. Sharp, 171 Fed. 466.

*The Suit Must Be One That Could Be Originally Brought in the Federal Court.*

By section 2 of the removal and jurisdictional act of 1888, it is provided that any suit arising under the Constitution and laws of the United States, of which the circuit courts of the United States are given original jurisdiction under section 1 of the act, can be removed by the defendant; and all other suits of a civil nature, of which the circuit courts are given jurisdiction by section 1 of the act, may be removed by the defendant or defendants if *nonresidents*. *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Re Winn*, 213 U. S. 458-464, 53 L. ed. 873-875, 29 Sup. Ct. Rep. 515; citing *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434, and *Ex parte Wisner*, *supra*; *Wahl v. Franz*, 49 S. Eq.—54.

L.R.A. 62, 40 C. C. A. 638, 100 Fed. 681, 682, and cases cited; *Kansas City & T. R. Co. v. Interstate Lumber Co.* 37 Fed. 6, 7; *Carp v. Queen Ins. Co.* 168 Fed. 782; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 994; *Southern P. Co. v. Burch*, 82 C. C. A. 34, 152 Fed. 168; *Goldberg, B. & Co. v. German Ins. Co.* 152 Fed. 832; *Yellow Aster Min. & Mill. Co. v. Crane Co.* 80 C. C. A. 566, 150 Fed. 580; *Blunt v. Southern R. Co.* 155 Fed. 499; *Baxter, S. & S. Const. Co. v. Hammond Mfg. Co.* 154 Fed. 992, 993; *Kentucky v. Chicago, I. & L. R. Co.* 123 Fed. 458; *Minnesota v. Northern Securities Co.* 194 U. S. 63, 64, 48 L. ed. 877, 878, 24 Sup. Ct. Rep. 598; *Foulk v. Gray*, 120 Fed. 156; *Eddy v. Casas*, 118 Fed. 364.

We thus see the right of removal is limited to such suits as could have been originally brought in the United States circuit courts under the first section of the jurisdictional act, which has already been discussed. While this was not the rule under the acts of 1789 and 1875, yet section 2 of the act of 1888, as above quoted, made a radical change in the right of removal by confining it to those suits that could be originally brought in the Federal court (*Foulk v. Gray*, 120 Fed. 161-163; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451; *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 240, 49 L. ed. 462, 25 Sup. Ct. Rep. 251; *Blunt v. Southern R. Co.* 155 Fed. 499; *Re Cilley*, 58 Fed. 978, 979), and in which four things are necessary:

First. It has to be a suit of a civil nature in law or equity.

Second. It must involve a sum or value in controversy exceeding two thousand dollars, exclusive of interest and costs. See "Amount as Ground for Remanding."

Third. It must arise between citizens of different States or under one of the conditions set forth in the first clause of that section, and not falling within any exception to the jurisdiction as contained in that act.

To illustrate: There is excepted out of the jurisdiction of the United States circuit court by the third clause of section

1 of the act of 1888 any suit by an assignee of a chose in action, if such instrument be payable to bearer and not made by a corporation (and not a foreign bill of exchange) to recover the contents of such chose in action, unless such suit might be brought by the assignor in the Federal court. Therefore, if the assignor could not sue in the Federal court the case cannot be removed, though as between the assignee and defendant there be diversity of citizenship. *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *Brooks v. Laurent*, 39 C. C. A. 201, 98 Fed. 647.

It had been frequently held that the circuit court would entertain a controversy removed from a State court, notwithstanding the fact that neither the plaintiff nor the defendant was resident within the district where the suit was brought, that the right of removal by the nonresident defendant had no relation to that clause of the act relating to the district in which the suit was brought, and consequently a class of cases arose where the removal was sustained though the suit could not have been originally brought in the Federal district.

Thus, citizens of different States may sue each other in a State court; in such case the nonresident defendant may remove the case to the Federal court of the district in which the suit is brought, though these nonresident citizens could not, by reason of the restriction on residence, have maintained the suit in the Federal court to which it was removed, as an original suit. *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* 108 Fed. 454; *Manufacturers Commercial Co. v. Brown Alaska Co.* 148 Fed. 312, and cases cited; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 996, 997; *Kansas City & T. R. Co. v. Interstate Lumber Co.* 37 Fed. 3; *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* 130 Fed. 585; *Cowell v. City Water-Supply Co.* 96 Fed. 769; *Robert v. Pineland Club*, 139 Fed. 1001.

The theory is that the restrictive clause of the act is only a privilege which the defendant may plead or waive if sued out of his district, and by his petition and removal he waives the privilege and invokes the jurisdiction of the court. *Foulk v. Gray*, 120 Fed. 157.

The plaintiff cannot object, as the right of removal is intended for the benefit of the nonresident defendant, and he

may exercise the right if the grounds exist, without the remotest reference to the wishes of the plaintiff. *Virginia-Carolina Chemical Co. v. Sundry Ins. Cos.* 108 Fed. 454; *Mexican Nat. R. Co. v. Davidson*, 157 U. S. 201, 39 L. ed. 672, 15 Sup. Ct. Rep. 563; *Duncan v. Associated Press*, 81 Fed. 421; *Burch v. Southern P. Co.* 139 Fed. 350; *Gregory v. Pike*, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 847; *Creagh v. Equitable Life Assur. Soc.* 83 Fed. 849; *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 900; *Baggs v. Martin*, 179 U. S. 206, 45 L. ed. 155, 21 Sup. Ct. Rep. 109; *Cowell v. City Water-Supply Co.* 96 Fed. 769. And the filing of the petition and bond for removal waived the right of the defendant to be sued in his district. *Whitworth v. Illinois C. R. Co.* 107 Fed. 557; *Faulk v. Gray*, 120 Fed. 157; *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 176, 115 Fed. 96.

We see from the foregoing that there has been much conflict of authority, but the stronger current was in favor of the rule "that suit must be brought in defendant's residence district, or in plaintiff's district if jurisdiction depended on diversity of citizenship, or in defendant's resident district if jurisdiction rested on a Federal question" did not apply to removals. Such was the understanding of the profession until the doctrine of the earlier cases was revised in *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150. Wisner, a citizen of Michigan, sued Beardsley, a citizen of Louisiana, in the State Court in St. Louis, Missouri; the defendant filed his petition for removal to the United States circuit court for the eastern district of Missouri, on the ground of diversity of citizenship. The motion to remand was refused on the authority of *Foulk v. Gray*, 120 Fed. 156, and *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* 130 Fed. 585. An appeal was taken to the Supreme Court in the nature of a petition for prohibition and mandamus by Wisner on the ground that the circuit court had no jurisdiction.

The court granted the writ of mandamus, ordering the circuit court to remand the case upon the ground that a citizen of one State suing a citizen of another State in a third State is not a removable case, as such suit could not have been originally brought in the Federal circuit court under sec. 2 of the jur-

isdictional and removal act of 1888. The Chief Justice referred to the earlier cases for support, but unquestionably arrested the trend of authority as developed in the circuit courts, and states without reservation that the removal by a nonresident defendant contemplated that the suit must have been brought by the plaintiff in the State and district of plaintiff's citizenship. *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 996, 997. Subsequently *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164, came before the Supreme Court, involving the same questions. It was held that nothing in *Ex parte Wisner*, supra, changed the rule that parties may waive the objection that the case was not brought in or removed to the particular Federal court required by statute. That where both parties consent to the jurisdiction of the Federal Court, as evidenced by the defendant in filing his petition and bond for removal, and by the plaintiff amending his pleading without challenging the jurisdiction or proceeding to trial, then the Federal Court could proceed to judgment. *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 369, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; *Moyer v. Chicago, M. & St. P. R. Co.* 168 Fed. 105; *Kreigh v. Westinghouse, C. K. & Co.* 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619; *De Valle Da Costa v. Southern P. Co.* 160 Fed. 217; *Louisville & N. R. Co. v. Fisher*, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68; *Clark v. Southern P. Co.* 175 Fed. 123; *Philadelphia & B. Face Brick Co. v. Warford*, 123 Fed. 843. But when a plea to the jurisdiction of the Federal court is seasonably made under the conditions as above stated, it should be sustained and the case remanded. *Macon Grocery Co. v. Atlantic Coast Line R. Co.* 215 U. S. 501, 54 L. ed. 300, 30 Sup. Ct. Rep. 184; *Hubbard v. Chicago, M. & St. P. R. Co.* 176 Fed. 997; *Shawnee Nat. Bank v. Missouri, K. & T. R. Co.* 175 Fed. 456; *Bottoms v. St. Louis & S. F. R. Co.* 179 Fed. 319; *Lawrence v. Southern Pacific Co.* 180 Fed. 827. The rule, then, seems now to be established that while a suit by a citizen of one State against a citizen of another State, brought in a third State, would be fatal to its removal, if seasonably objected to, yet if the suit is otherwise within Federal jurisdiction, and is removed, and both parties recognize the jurisdic-

tion of the Federal court by proceeding with the case therein, then the court may adjudicate the case. Where a cause is removed and it appears from the record that the parties are not citizens of the State in which the suit is brought, the Federal court will allow the petition for removal to be amended to show that the plaintiff was in fact a citizen of the district of suit. *Harding v. Standard Oil Co.* 170 Fed. 651.

But there is a class of cases which, by reason of the procedure necessary to prosecute them, cannot be brought originally in the Federal court, yet may be removed. *Kirby v. Chicago, N. W. R. Co.* 106 Fed. 552; *West Virginia v. King*, 112 Fed. 369; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 213, 214; *Wilson v. Smith*, 66 Fed. 81; *Re Jarnecke Ditch*, 69 Fed. 163. As in condemnation suits. *Colorado Midland R. Co. v. Jones*, 29 Fed. 193; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 210; *Searl v. School Dist. No. 2*, 124 U. S. 199, 31 L. ed. 416, 8 Sup. Ct. Rep. 460; *Madisonville Traction Co. v. St. Bernard Min. Co.* 130 Fed. 790, 791; *South Dakota C. R. Co. v. Chicago, M. & St. P. R. Co.* 73 C. C. A. 176, 141 Fed. 578; *Broadmoor Land Co. v. Curr*, 73 C. C. A. 537, 142 Fed. 421.

Thus a suit under a statute of a State to collect taxes may require such procedure as would prevent an original action in the Federal court, yet the controversy may present every element necessary under the first section of the act of 1888; in such case the suit can be removed to the Federal court. *Re Stutsman County*, 88 Fed. 337; *Re Jarnecke Ditch*, 69 Fed. 163; *Waha Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrig. Co.* 158 Fed. 141; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 209.

The conferring of exclusive jurisdiction by States on its own courts by prescribing exclusive methods can affect the right of removal if it be a suit of a civil nature cognizable in law or equity. *Barber Asphalt Paving Co. v. Morris*, 67 L.R.A. 761, 66 C. C. A. 55, 132 Fed. 949, and cases cited; *Morrill v. American Reserve Bond Co.* 151 Fed. 306.

## CHAPTER CXXIX.

### AMENDING PETITION FOR REMOVAL.

The rule is, a petition for removal cannot be amended if the jurisdiction is not stated, but can if imperfectly stated. *Santa Clara County v. Goldy Mach. Co.* 159 Fed. 751; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240-245, 33 L. ed. 144, 145, 9 Sup. Ct. Rep. 692; *Shane v. Butte Electric R. Co.* 150 Fed. 801-814; *Fife v. Whittell*, 102 Fed. 537; *Healy v. McCormick*, 157 Fed. 318; *Wallenburg v. Missouri, P. R. Co.* 159 Fed. 217; *Fred Macey Co. v. Macey*, 68 C. C. A. 363, 135 Fed. 729; *Dinet v. Delavan*, 117 Fed. 978; *Dalton v. Milwaukee Mechanics' Ins. Co.* 118 Fed. 877; *Dalton v. Germania Ins. Co.* 118 Fed. 936; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 814.

Thus, allegations as citizenship have been permitted to be amended when defectively stated (*Thompson v. Stalman*, 131 Fed. 809; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Kinney v. Columbia Sav. & L. Asso.* 191 U. S. 78, 48 L. ed. 103, 24 Sup. Ct. Rep. 30; *Muller v. Chicago, I. & L. R. Co.* 149 Fed. 939, 940; *Flynn v. Fidelity & C. Co.* 145 Fed. 265; *Hodge v. Chicago & A. R. Co.* 57 C. C. A. 388, 121 Fed. 48; *Kerr v. Modern Woodmen*, 54 C. C. A. 655, 117 Fed. 595; *Kyle v. Chicago, R. I. & P. R. Co.* 173 Fed. 238; *Kansas City Southern R. Co. v. Prunty*, 66 C. C. A. 163, 133 Fed. 14; *De La Montanya v. De La Montanya*, 158 Fed. 117; *Wilbur v. Red Jacket Consol. Coal & Coke Co.* 153 Fed. 662; *Crehore v. Ohio & M. R. Co.* 131 U. S. 245, 33 L. ed. 145, 9 Sup. Ct. Rep. 692; *Johnson v. F. C. Austin Mfg. Co.* 76 Fed. 616; *Tremper v. Schwabacher*, 84 Fed. 414; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 101, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; *Stadlerman v. White Line Towing Co.* 92 Fed. 209; *Hadfield v. Northwestern Life Assur. Co.* 105 Fed. 530);

and it seems under certain conditions the State court may permit an amendment. *Roberts v. Pacific & A. R. & Nav. Co.* 104 Fed. 577.

With the exceptions above stated, you must stand on your case as made, showing jurisdiction. *Ibid.*; *Fife v. Whittell*, 102 Fed. 537; *Murphy v. Payette Alluvial Gold Co.* 98 Fed. 321; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*), 151 U. S. 676, 38 L. ed. 312, 14 Sup. Ct. Rep. 533; *Coples v. Texas & P. R. Co.* 67 Fed. 9; *Grand Trunk R. Co. v. Twitchell*, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 729, and cases cited; *Waite v. Phoenix Ins. Co.* 62 Fed. 769; *Carson v. Dunham*, 121 U. S. 430, 30 L. ed. 995, 7 Sup. Ct. Rep. 1030; *Stevens v. Nichols*, 130 U. S. 231, 32 L. ed. 915, 9 Sup. Ct. Rep. 518 (see authorities under "Petition Cannot be Amended").

But whatever the rule may be, if the circuit court of the United States permits the amendment, it will not be reversed on appeal. *Ayres v. Watson*, 137 U. S. 584, 34 L. ed. 803, 11 Sup. Ct. Rep. 201.



## CHAPTER CXXX.

### SERVICE OF PROCESS IN A STATE COURT AFFECTING REMOVAL.

We have seen that when a case is removed it retains the same status as to all process and proceedings that have been taken in the State court. Sec. 4 and 6, act of 1875. I will now speak of how far the service or nonservice of process in the State court will bind the Federal court in removing a cause, or after its removal.

In discussing who may remove a cause when the right of removal depends on diversity of citizenship, it was stated as a rule that where the cause of action was joint and the suit brought against a resident and nonresident defendant, the fact that the resident was not served at the time the application for removal should be made did not give the nonresident the right of removal. *Patchin v. Hunter*, 38 Fed. 51; *Putnam v. Ingraham*, 114 U. S. 57, 29 L. ed. 65, 5 Sup. Ct. Rep. 746; *Brooks v. Clark*, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301; *Lederer v. Sire*, 105 Fed. 529.

The nonservice of the resident defendant cannot change the character of the suit, *Ibid.* and the U. S. Rev. Stat. sec. 737, U. S. Comp. Stat. 1901, p. 587, authorizing the court to proceed to the trial of the suit between the parties properly before the court, does not apply to removals. *Ames v. Chicago, S. F. & C. R. Co.* 39 Fed. 881. See *Whitcomb v. Smithson*, 175 U. S. 637, 638, 44 L. ed. 305, 20 Sup. Ct. Rep. 248.

However, if the cause of action be joint, and both parties sued, but the resident not served is dismissed from the suit, or if both resident and nonresident be served and the resident be dismissed, then the nonresident defendant may remove the cause to the Federal court as soon as the resident is dismissed, though the time for removal has elapsed; but as long as the plaintiff seeks to recover against both the resident and nonresident, and for that purpose holds them in the case, the fact that he has not served the resident would not give the nonresident the right of removal. *Powers v. Chesapeake & O. R. Co.*

169 U. S. 92-102, 42 L. ed. 673-677, 18 Sup. Ct. Rep. 264; *Doremus v. Root*, 94 Fed. 762; *Kansas City Suburban Belt R. Co. v. Herman*, 187 U. S. 69, 47 L. ed. 78, 23 Sup. Ct. Rep. 24.

In *Tremper v. Schwabacher*, 84 Fed. 413, another rule is indicated, which is as follows: Where by a State statute a suit is brought against several parties, residents and nonresidents, the nature of whose interest in the subject-matter is one of copartnership, and a joint judgment against all can be recovered on a service on one of them, thereby subjecting their joint interest to execution under such judgment, then, where the service is made on the nonresident only, he may remove. See, also, *Diday v. New York, P. & O. R. Co.* 107 Fed. 569. If, however, both resident and nonresident be served, and joint as well as individual judgments be sought, then the nonresident cannot remove. See "Partners as Parties."

Another rule to which your attention is called is as follows: If the plaintiff sues on a joint and several liability a resident and nonresident defendant, and serves only the nonresident, and proceeds against him, this is an election to sever, and gives the nonresident the right to remove as soon as the purpose is evident that he alone is to be sued. *Berry v. St. Louis & S. F. R. Co.* 118 Fed. 911-915; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. See *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896.

Another rule to be deduced from the authorities is that the fact that resident parties to the suit are merely formal parties, or not sufficiently identified in interest as to be materially affected by a judgment, or joined under some pretense without any real interest, then whether they be served or not with process will not affect the right of a nonresident defendant or defendants joining in the application from removing the cause to the Federal court. *Myers v. Murray, N. & Co.* 11 L.R.A. 216, 43 Fed. 696; *Nelson v. Hennessey*, 33 Fed. 113; *May v. St. John*, 38 Fed. 770; *Parkinson v. Barr*, 105 Fed. 81; *Loop v. Winters*, 115 Fed. 362-366; *Henderson v. Cabell*, 43 Fed. 258; *Wood v. Davis*, 18 How. 467, 15 L. ed. 460. (See "Nominal Parties.")

Again, where a suit is brought against a resident and nonresident, if the interest of the resident defendant is identical

with that of the plaintiff, the nonresident defendant may remove, though the resident be served or not with process. *Brown v. Murray, Nelson & Co.* 43 Fed. 614; *Hutton v. Bancroft & S. Co.* 77 Fed. 481.

Second. Removal does not waive the question as to the proper service of process in the State courts.

The special appearance of the defendant to petition for removal is not such an appearance as will waive objection to service after removal. *Lathrop-Shea & H. Co. v. Interior Constr. & Improv. Co.* 150 Fed. 666-670, and cases cited; *Cady v. Associated Colonies*, 119 Fed. 420; *Remington v. Central Pacific R. Co.* 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577; *Davis v. Cleveland C. C. & St. L. R. Co.* 146 Fed. 403; *Goepfert v. Compagnie Generale Transatlantique*, 156 Fed. 199, 200; *Louden Machinery Co. v. American Malleable Iron Co.* 127 Fed. 1008; *West v. Cincinnati, N. O. & T. P. R. Co.* 170 Fed. 349; *Conley v. Mathieson Alkali Works*, 110 Fed. 730, S. C. 190 U. S. 411, 47 L. ed. 1115, 23 Sup. Ct. Rep. 728; *Stowe v. Santa Fe Pacific R. Co.* 117 Fed. 368; *Collins v. American Spirit Mfg. Co.* 96 Fed. 133; *Mecke v. Valley Town Mineral Co.* 89 Fed. 114; *Calderhead v. Downing*, 103 Fed. 30. But in *New York Constr. Co. v. Simon*, 53 Fed. 1, it was declared that it was the settled rule of the sixth circuit that a removing defendant could not object to service unless the objection was raised in the State court. *Bentlif v. London & C. Finance Corp.* 44 Fed. 667, disapproved.

If the State court did not rightly acquire jurisdiction, it may be raised in the Federal court. (See authorities above.) *Empire Min. Co. v. Propeller Tow-Boat Co.* 108 Fed. 903; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brow*, 164 U. S. 276, 41 L. ed. 433, 17 Sup. Ct. Rep. 126; *Cady v. Associated Colonies*, 119 Fed. 423; *Peterson v. Morris*, 98 Fed. 49; *Auracher v. Omaha & St. L. R. Co.* 102 Fed. 1; *Case v. Smith, L. & Co.* 152 Fed. 730.

It seems that if the State court has overruled the motion to set aside service, the Federal court will not rehear it, that is where the service in the State court is valid the Federal court should not set it aside, even though it may have been,

had the suit been originally brought in the Federal court. *Sleicher v. Pullman Co.* 170 Fed. 365, 366; *Allmark v. Platte S. S. Co.* 76 Fed. 615. But when a motion is made in a State court and not acted on, it may be heard in the Federal court (*Kauffman v. Kennedy*, 25 Fed. 785); and where service is by publication, objection that the State court was without jurisdiction for want of a *res* to support it may be made. *Ahlhauser v. Butler*, 50 Fed. 705; *Atchison v. Morris*, 11 Biss. 191, 11 Fed. 582.

The rule may be stated that the authority to determine whether the state court had jurisdiction is not limited by state laws. *Cady v. Associated Colonies*, 119 Fed. 423, 424, and cases cited; *Case v. Smith, L. & Co.* 152 Fed. 730; *Goldey v. Morning News*, 156 U. S. 523, 39 L. ed. 519, 15 Sup. Ct. Rep. 559.

Where the service was by publication on the foreclosure of a mortgage, the Federal court will not set aside the service so far as the foreclosure is concerned, but will not give a personal judgment on the service. *Du Pont v. Abel*, 81 Fed. 534.

Where service is by attachment in State court without personal service, it is no ground to remand. *Purdy v. Wallace Müller & Co.* 81 Fed. 513; *Lebensberger v. Scofield*, 71 C. C. A. 476, 139 Fed. 380; *Long v. Long*, 73 Fed. 369; *Vermilya v. Brown*, 65 Fed. 149; *Richmond v. Brookings*, 48 Fed. 241. See *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43. (See chapter 122, "Status after Removal.")

### *Amending Service After Removal.*

Whatever may be the defects of service, a state officer cannot amend after removal. *Tallman v. Baltimore & O. R. Co.* 45 Fed. 156; *Hawkins v. Peirce*, 79 Fed. 452. Nor has the Federal court after removal any power to issue process to perfect the service of the State court. *Stowe v. Santa Fe P. R. Co.* 117 Fed. 368. Therefore the Federal court must, in the absence of proper service, dismiss the case, because if the State court had no jurisdiction it cannot take any. *Ibid.* But thus dismissing the case will not prevent the State court from again taking jurisdiction on the same cause of action. *Gassman v. Jarvis*, 100 Fed. 146; *Texas Cotton Products Co. v. Starnes*, 128 Fed. 183, 184, and cases cited.

## CHAPTER CXXXI.

### REMOVAL ON GROUND OF LOCAL PREJUDICE.

#### *Who May Remove.*

I have already referred to the statute permitting the removals from State courts by *any* defendant being a nonresident, at *any time before* the trial in the State court, when it shall be made to appear to the United States circuit court that from prejudice or local influence, such defendant will not be able to obtain justice in the State court in which the suit is pending or in any other State court to which the said defendant may, under the laws of the State, remove the same, provided, the amount in controversy be over two thousand dollars. *Water Comrs. v. Robbins*, 125 Fed. 656; *Cochran v. Montgomery County*, 199 U. S. 271, 50 L. ed. 187, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; *Malone v. Richmond & D. R. Co.* 35 Fed. 625; *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. New Code, secs. 28, 29.

There has been much controversy over the fact as to whether, under the language of the act, a nonresident defendant could remove unless there was a separable controversy; but, whatever may have been the rule under U. S. Rev. Stat. sec. 639, see *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207, yet the recognized rule under the act of 1888 permits *any* nonresident defendant, though joined with resident citizen, to remove the case, if prejudice or local influence exists. *Holmes v. Southern R. Co.* 125 Fed. 301; *Whelan v. New York L. E. & W. R. Co.* 1 L.R.A. 65, 35 Fed. 849; *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 665, and cases cited; *Montgomery County v. Cochran*, 116 Fed. 994; *Bartlett v. Gates*, 117 Fed. 362; *Seaboard Air Line R. Co. v. North Carolina R. Co.* 123 Fed. 629; *Jackson & S. Co. v. Pearson*,

60 Fed. 113; *Haire v. Rome R. Co.* 57 Fed. 321; *Fisk v. Henarie*, 32 Fed. 417.

The weight of authority is certainly in favor of the text, as far as numbers go, at least, but the cases upholding this rule rest upon the fact that sec. 2 of the act of 1888, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 509, allowing a removal for existing prejudice, or local influence is a distinct, or rather independent, ground for removal. It will be seen, however, that the case of *Cochran v. Montgomery County*, cited above, was appealed to the Supreme Court of the United States, in which a citizen of Alabama had sued a citizen of Alabama and a citizen of Maryland in the State court of Alabama, which was removed to the Federal court in Alabama upon the petition of the Maryland defendant, setting up prejudice and local influence. The case was reversed and remanded to the State court because improperly removed, the court stating that the 4th clause of section 2 of the act of 1888 does not furnish a separate and independent ground of Federal jurisdiction, but only a special condition to be applied in the preceding clauses; that is, the local prejudice clause does not describe a new class of suits that may be removed from the State courts, but a ground for removing a class of suits previously defined. Therefore the Chief Justice concludes that the construction given by the various cases, above cited, to the local prejudice clause, to wit, that the words "any defendant being such citizen of another State may remove" implied that there might be defendants who were not citizens of another State, and yet the cause be removable was erroneous, and in the light of the preceding section of the removal act, requiring the controversy to be removed, to be between a citizen or citizens of one State and a citizen or citizens of another or other States, did not include cases where the controversy was partly between citizens of the same State, and consequently the local prejudice clause could not apply to the latter condition. Again, it is assumed that to reach a different conclusion would conflict with the rule that a cause is only removable when it may have been originally brought in the Federal court. This case was followed in *Cleveland v. Cleveland, C. C. & St. L. R. Co.* 77 C. C. A. 467, 147 Fed. 173, and in *Southern R. Co. v. Thomason*, 77 C. C. A. 170,

146 Fed. 974. So the rule seems to be established that to remove on the ground of local prejudice, etc., it must be a suit in which there is a controversy between citizens of different States, as required under the rule of jurisdiction by diversity of citizenship. *Terre Haute v. Evansville & T. H. R. Co.* 106 Fed. 549; *Campbell v. Milliken*, 119 Fed. 982; *Rosenthal v. Coates*, 148 U. S. 146, 37 L. ed. 400, 13 Sup. Ct. Rep. 576.

### *Must Defendants All Join in Petition*

The act says, "any defendant being a citizen of another State may remove," and it is said in *Cochran v. Montgomery County*, 199 U. S. 273, 50 L. ed. 188, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451, that these words were inserted in order that a defendant entitled to remove may not be cut off from the right by a refusal of codefendants to join in the application. *Holmes v. Southern R. Co.* 125 Fed. 302, 303; *Bonner v. Meikle*, 77 Fed. 485. One defendant cannot remove because of local prejudice as between him and another defendant. *Hanrick v. Hanrick*, 153 U. S. 198, 38 L. ed. 687, 14 Sup. Ct. Rep. 835.

### *Petition for Removal.*

The petition must be sworn to and presented to the Federal court before the trial of the cause in the State court, and when removed the plaintiff must join issue in the Federal court, where alone the facts can be tried. Act of 1888, section 2; *Bonner v. Meikle*, 77 Fed. 485; *Hanrick v. Hanrick*, 153 U. S. 197, 38 L. ed. 687, 14 Sup. Ct. Rep. 835; *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225; *Hobart v. Illinois C. R. Co.* 81 Fed. 5; *Kaitel v. Wylie*, 38 Fed. 865; *Farmers' & M. Nat. Bank v. Schuster*, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. See *Montgomery County v. Cochran*, 116 Fed. 986, for form of petition. Also *Weldon v. Fritzlen*, 128 Fed. 609, 610. See New Code, secs. 28, 29.

### *What to State.*

It is not sufficient to state that one has reason to believe

that from prejudice, etc., he will be unable to obtain justice. The existence of prejudice must be alleged as a matter of fact. *Collins v. Campbell*, 62 Fed. 850. (See affidavit.)

*Where Application Made and When.*

We see the application must be made to the Federal court, and can be made "at any time before the trial" in the State court of the case on its merits. *Fisk v. Henarie*, 142 U. S. 467, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207; *Hobart v. Illinois C. R. Co.* 81 Fed. 5, but see *Whelan v. New York, L. E. & W. R. Co.* 1 L.R.A. 65, 35 Fed. 849, holding not too late after demurrer heard in the State court, but not after trial in the State court, though a mistrial. *Farmers' & M. Nat. Bank v. Schuster*, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; *Rosenthal v. Coates*, 148 U. S. 143, 37 L. ed. 399, 13 Sup. Ct. Rep. 576.

*The Affidavit.*

The affidavit for removal should set forth the facts and circumstances so as to satisfy the court, if true, of the existence of prejudice or adverse local influence. *Amy v. Manning*, 38 Fed. 868; *Re Pennsylvania Co.* 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 154. New Code, sec. 28.

It should not rest upon mere belief or opinion, but be direct in its allegations. *Franz v. Wahl*, 81 Fed. 9; *Short v. Chicago, M. & St. P. R. Co.* 33 Fed. 114; *Schwenk v. Strang*, 8 C. C. A. 92, 19 U. S. App. 300, 59 Fed. 209; *Crotts v. Southern R. Co.* 90 Fed. 2; *Curnow v. Phoenix Ins. Co.* 44 Fed. 305; *Hall v. Chattanooga Agri. Works*, 48 Fed. 602.

In *Collins v. Campbell*, 62 Fed. 851, and *Crotts v. Southern R. Co.* 90 Fed. 2, it is said that the petition and affidavit need not set out the facts upon which the belief in the existence of the prejudice is founded, but the existence of the prejudice must be alleged as a fact.

The affidavit may be filed in the State court, and a certified copy in the Federal court. *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225. See *Crotts v. Southern R. Co.* 90 Fed. 1; *Montgomery County v. Cochran*, 116 Fed. 987, 988, for form of affidavit.



See affidavit held insufficient. *Dennison v. Brown*, 38 Fed. 535; *Hakes v. Burns*, 40 Fed. 33; *Short v. Chicago, M. & St. P. R. Co.* 34 Fed. 225; *Turnbull Wagon Co. v. Linthicum Carriage Co.* 80 Fed. 4; *Collins v. Campbell*, 62 Fed. 850. See sec. 28, New Code, chap. 3.

### *Notice.*

Reasonable notice of the application to the Federal court ought to be given to the adverse party, so that an opportunity to contest the application in the Federal court may be had. *Schwenk v. Strang*, 8 C. C. A. 92, 19 U. S. App. 300, 59 Fed. 209-211; *Carson & R. Lumber Co. v. Holtzclaw*, 39 Fed. 578; *Malone v. Richmond & D. R. Co.* 35 Fed. 625. See *Crotts v. Southern R. Co.* 90 Fed. 1; and authorities cited, where it is held that the removal may be granted on an *ex parte* hearing (*Montgomery County v. Cochran*, 116 Fed. 985), but when so granted plaintiff may thereafter contest the allegations of the petition (*Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805); but, giving notice of the application is the better practice. *Herndon v. Southern R. Co.* 73 Fed. 307; *Bonner v. Meikle*, 77 Fed. 485; *Reeves v. Corning*, 51 Fed. 774. But when obtained without notice the court will permit the plaintiff to contest the allegations, and will give a reasonable time to do so. *Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805.

### *How Issue Tried.*

The judiciary act of 1888, section 2, provides that the circuit court shall examine into the truth of the affidavit and the grounds thereof on application of the plaintiff. The issue may be tried in such manner as the court may direct; that is, by affidavits, depositions, or by oral evidence. *Short v. Chicago, M. & St. P. R. Co.* 33 Fed. 117; *Re Pennsylvania Co.* 137 U. S. 456, 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 141; *Carpenter v. Chicago, M. & St. P. R. Co.* 47 Fed. 535; *Carson v. Dunham*, 121 U. S. 425, 30 L. ed. 993, 7 Sup. Ct. Rep. 1030; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896. (See Nature of Proof.) New Code, sec. 28.

*Nature of Proof.*

The amount and manner of proof required must be left to the discretion of the court (*Crotts v. Southern R. Co.* 90 Fed. 1; *Tacoma v. Wright*, 84 Fed. 836; *Smith v. Crosby Lumber Co.* 46 Fed. 819; *Parker v. Vanderbilt*, 136 Fed. 250; *Montgomery County v. Cochran*, 116 Fed. 985; *Amy v. Manning*, 38 Fed. 868; *Maher v. Tower Hotel Co.* 94 Fed. 225; *Detroit v. Detroit City R. Co.* 54 Fed. 2; *Southworth v. Reid*, 36 Fed. 451; *Bellaire v. Baltimore & O. R. Co.* 146 U. S. 118, 36 L. ed. 911, 13 Sup. Ct. Rep. 16), but the inability to obtain justice because of prejudice or local influence in the State court in which the suit is brought, as well as in any State court to which under the laws of the State the case could be removed, must appear to the legal satisfaction of the court (*Ibid.*; *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207), as to changing venue in case of local prejudice.

As to what is sufficient to create legal satisfaction will be found discussed in *Re Pennsylvania Co.* 137 U. S. 457, 34 L. ed. 741, 11 Sup. Ct. Rep. 141, and it need not be shown that the prejudice or influence primarily exists against the party seeking removal, but it may be a prejudice in favor of his adversary (*Neale v. Foster*, 31 Fed. 55; *Parks v. Southern R. Co.* 90 Fed. 4; *Bartlett v. Gates*, 117 Fed. 362), and to which the judge is exposed. *Montgomery County v. Cochran*, 116 Fed. 985, is a case where the facts were held sufficient. *Detroit v. Detroit City R. Co.* 54 Fed. 18.

*Order of Removal.*

The circuit court issues its order to the clerk of the State court in which the cause is pending, and requires him to certify to the United States circuit court a transcript of the proceedings in the cause (see 90 Fed. 2-4, for forms or order); and while the law does not require it, proper respect for State courts demands that the certified copy of the order of removal be filed in the State court. *Bartlett v. Gates*, 117 Fed. 362.

*Motion to Remand.*

The plaintiff may contest in the Federal court the grounds

of the petition for removal to prevent it, if seasonably notified of the application, or he may after removal, upon motion to remand, contest the allegations of the petition for removal. *Ellison v. Louisville & N. R. Co.* 50 C. C. A. 530, 112 Fed. 805; *Montgomery County v. Cochran*, 116 Fed. 985. As to form of motion to remand, see 116 Fed. 988.

The suit may be divided and remanded in part. *Fisk v. Henarie*, 142 U. S. 468, 35 L. ed. 1082, 12 Sup. Ct. Rep. 207. By clause 4 of section 2 of the act of 1888, it is provided that if it further appear that said suit can be fully determined as to other defendants in a State court, unaffected by prejudice, and no party to the suit will be prejudiced by a separation of the parties, said court may direct the suit to be remanded as to such parties. *Holmes v. Southern R. Co.* 125 Fed. 303.

### *Burden of Proof.*

We thus see what issue can be made in a motion to remand the cause to the State court, and where the allegations of the petition by which the case has been removed have thus been put in issue, the burden is on the defendant to establish the jurisdiction he seeks. *Carson v. Dunham*, 121 U. S. 421, 30 L. ed. 992, 7 Sup. Ct. Rep. 1030.

### *Remedy When Remand Refused.*

If the remand for any cause is refused, file your bill of exceptions as follows:

Title as in cause.

In the United States Court.....  
District of....., ....., A.  
D. 19....

#### *Bill of Exceptions.*

Be it remembered that on this day came on to be heard the plaintiff's motion to remand the above entitled and numbered cause to the State court from whence it was removed, and the court having heard the motion and argument of counsel thereon, and having considered the same, said motion was by said court in all things overruled and held for naught, to which ruling of the court plaintiff excepted, and here tenders his bill of exceptions asking that the same be approved and made a part of the record, which in accordingly done.

The object is to reserve the point in case the cause is appealed. There is no appeal from an order to remand (*German Nat. Bank v. Speckert*, 181 U. S. 407-409, 45 L. ed. 926, 927, 21 Sup. Ct. Rep. 688; *Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141; sec. 2, act 1888, clause 6); but where jurisdiction is retained by overruling the motion to remand, it may be revised by the appellate court. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *Powers v. Chesapeake & O. R. Co.* 169 U. S. 98, 42 L. ed. 675, 18 Sup. Ct. Rep. 264; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 557-582, 40 L. ed. 536-543, 16 Sup. Ct. Rep. 389.

*Mandamus as Remedy When Remand Refused.*

*Re Dunn*, 212 U. S. 375, 53 L. ed. 558, 29 Sup. Ct. Rep. 299; *Re Winn*, 213 U. S. 458, 53 L. ed. 873, 29 Sup. Ct. Rep. 515; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

*Effect of Order Remanding.*

The order is conclusive on the State court. *Western U. Teleg. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 557, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Pioneer Sav. & L. Co. v. Peck*, 20 Tex. Civ. App. 111, 49 S. W. 168.

## CHAPTER CXXXII.

### REMOVAL BY RECEIVERS.

I will briefly refer to removals by Federal receivers when sued in a State court, only to suggest when motions to remand may be made.

By section 3 of the act of 1888, amending the act of 1887, 25 Stat. at L. 436, chap. 866, U. S. Comp. Stat. 1901, p. 582, a Federal receiver can be sued in a State court in respect of any act or transaction of his in carrying on the business connected with the property of which he is a receiver, without the previous leave of the court appointing him.

As to the right of Federal receivers to remove a case brought in the State court under this act, there has been conflict in the cases, but I think the questions are now settled with reasonable definiteness.

In *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171, the direct questions arose in an effort by a Federal receiver to remove a case from the State court on the sole ground that he was sued as a Federal receiver. *S. C.* 41 C. C. A. 160, 101 Fed. 5; *Rural Home Teleph. Co. v. Powers*, 176 Fed. 986.

The court, construing the act above referred to, says: "This act gave the citizen the right to determine in his local court by verdict of a jury the amount and justness of his cause of action, and the manifest object rejects the construction of many of the circuit courts that the act of 1888 did not change the law further than to relieve one from contempt for suing the receiver in the State court." *Pepper v. Rogers*, 128 Fed. 988; *Chesapeake, O. & S. W. R. Co. v. Smith*, 101 Ky. 707, 42 S. W. 538; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 59 Fed. 523.

To permit such a construction eliminated the very spirit, if not the letter, of the act, for if it could be removed to the Fed-

eral court simply because the receiver was appointed by a Federal court, wherein was the benefit to the citizen to sue in his local court?

The privilege in no way interferes with the receiver's custody of the property, for this is abundantly protected by the latter clause of section 3 of the act against such interference. *Ibid.*; *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 338, 45 L. ed. 222, 21 Sup. Ct. Rep. 171; *Marrs v. Felton*, 102 Fed. 778.

This case reasonably settles the question that the right to sue a Federal receiver in a State court to establish a claim *growing out of any act or transaction* of such receivers in carrying on the business is a substantial right and presents no Federal question, nor a case arising under the Constitution and laws of the United States simply by reason of the fact that the defendant was a Federal receiver. Consequently, a case removed on this ground can be remanded on motion.

In *Pope v. Louisville, N. A. & C. R. Co.* 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500, the court held that the order of a Federal court appointing a receiver was not equivalent to a law of the United States in the meaning of the Constitution. *Bausman v. Dixon*, 173 U. S. 114, 43 L. ed. 634, 19 Sup. Ct. Rep. 316.

Of course, if the suit in the State court against the Federal receiver substantially involves a controversy dependent on the construction of the Constitution, laws, or treaties of the United States, and which appears in the case as stated by the plaintiff, or on any other ground of Federal jurisdiction appearing, then receivers, like any other citizen, may remove the case from the State to the Federal courts. *Gableman v. Peoria, D. & E. R. Co.* 179 U. S. 341, 342, 45 L. ed. 223, 224, 21 Sup. Ct. Rep. 171.

What has thus been said about the right of removal by Federal receivers does not apply to receivers of corporations created by Congress. Such corporations are exceptions to the rules applicable to the jurisdiction of the Federal courts, and the bare statement in the petition for removal that the applicant is a receiver of a Federal corporation, would be sufficient to support the removal of the cause. I have, however, sufficiently discussed this anomaly.

*National Banks.*

National banks, though created by Congress, are excluded from this privilege attached to a national charter. By act of 1882, 22 Stat. at L. 162, chap. 290, U. S. Comp. Stat. 1901, p. 3457, they are put upon the same plane with banks not organized under the laws of the United States.

In *Leather Mfg. Nat. Bank v. Cooper*, 120 U. S. 779, 30 L. ed. 817, 7 Sup. Ct. Rep. 777, this act was construed, and it was held that removals by these banks from the State to the Federal courts were prohibited unless some ground of Federal jurisdiction existed other than their creation by Congress. *Wichita Nat. Bank v. Smith*, 19 C. C. A. 42, 36 U. S. App. 530, 72 Fed. 568; *Burnham v. First Nat. Bank*, 3 C. C. A. 486, 10 U. S. App. 485, 53 Fed. 163.

By section 4 of the act of 1888, 25 Stat. at L. 436, chap. 866, U. S. Comp. Stat. 1901, p. 514, all banking associations for the purpose of jurisdiction were to be deemed citizens of the State in which they were located, and Federal jurisdiction was conferred to the grounds upon which other citizens may invoke it, except in cases where the affairs of the bank were being wound up, or in suits by the United States, its officers or agents. *Guarantee Co. v. Hanway*, 44 C. C. A. 312, 104 Fed. 369; *International Trust Co. v. Weeks*, 116 Fed. 898.

*Intervention for Removal.*

In closing this subject, I shall call your attention to cases removed by interveners, and causes for remanding the same.

The question arises as to whether a party can intervene in a suit and remove it to the Federal court, there being no ground of Federal jurisdiction prior to his intervention.

It is clear that whatever may have been the right of removal by the defendant before one has intervened, if at the time of the intervention the right has been lost by lapse of time, or from any other cause by the defendant, then the intervener who causes himself to be associated with, or substituted for, the defendant cannot remove the case to the Federal court. One coming voluntarily into the action must take the case as he finds it. *Nash v. McNamara*, 145 Fed. 543, and cases cited; *Cable*

v. Ellis, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85; Speckert v. German Nat. Bank, 38 C. C. A. 682, 98 Fed. 154, 155; Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 997; Farmers' & M. Nat. Bank v. Schuster, 29 C. C. A. 649, 52 U. S. App. 612, 86 Fed. 161; Richmond & D. R. Co. v. Findley, 32 Fed. 642; Olds Wagon Works v. Benedict, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1; McDonnell v. Jordan, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 886.

A substituted party comes in only with the rights of the party whose place he takes. Houston & T. C. R. Co. v. Shirley, 111 U. S. 358, 28 L. ed. 455, 4 Sup. Ct. Rep. 472. So a party who purchases property *pendente lite* comes in subject to the disabilities of the original parties so far as removal is concerned. Jefferson v. Driver, 117 U. S. 272, 29 L. ed. 897, 6 Sup. Ct. Rep. 729. So an intervener who introduces himself into an action to protect himself as against an indemnity to the defendant cannot remove it if the defendant cannot; or if he holds in privity with defendant. Ibid.; Olds Wagon Works v. Benedict, 14 C. C. A. 285, 32 U. S. App. 116, 67 Fed. 1-4; Goodnow v. Dolliver, 26 Fed. 470; Weller v. J. B. Pace Tobacco Co. 32 Fed. 860; Concord Coal Co. v. Haley, 76 Fed. 882; Grand Trunk R. Co. v. Twitchell, 8 C. C. A. 237, 21 U. S. App. 45, 59 Fed. 727. So parties brought into a suit by cross bill in a State court, who have succeeded to the interests of plaintiff, cannot remove as defendants. Nash v. McNamara, 145 Fed. 541. So where one intervenes in a suit claiming the proceeds of a check sued upon cannot remove the case if the right of removal did not exist when he intervened. Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 997-999, and authorities cited; Cable v. Ellis, 110 U. S. 389, 28 L. ed. 186, 4 Sup. Ct. Rep. 85.

In Kidder v. Northwestern Mut. L. Ins. Co. 117 Fed. 998, it is said the statute makes no provision for a removal by anyone except the "defendant or defendants therein." It makes no provision at the instance of persons who may be pecuniarily interested to intervene and remove the cause to the Federal court. Nor does it make any provision for compelling or allowing other parties to be influenced or substituted as defendants, and thereby make a removable cause out of one which was previously not removable.



If the State court refuses intervention, the Federal courts are bound by it, and an intervener cannot remove to test his right to intervene. *Kidder v. Northwestern Mut. L. Ins. Co.* 117 Fed. 998, 999. *The Snow v. Texas Trunk R. Co.* 16 Fed. 1, and *American Nat. Bank v. National Ben. & Casualty Co.* 70 Fed. 420, are noted, but declared erroneous.

Where a petition has not been granted they are not parties, and cannot remove. As to the effect of the refusal of an application to intervene, see *Credits Commutation Co. v. United States*, 177 U. S. 314, 315, 44 L. ed. 784, 785, 20 Sup. Ct. Rep. 636; *Land Title & T. Co. v. Asphalt Co.* 127 Fed. 21; *Massachusetts Loan & T. Co. v. Kansas City & A. R. Co.* 49 C. C. A. 18, 110 Fed. 30. But it seems where the intervener is the substantial party to the contest he may intervene and remove. *Chase v. Beech Creek R. Co.* 144 Fed. 572. A receiver may intervene, where the bank of which he is receiver is being wound up, when the bank is sued, and such receiver may remove the case to the Federal court. *Speckart v. German Nat. Bank*, 85 Fed. 12.

### *Interpleader.*

When he may remove. *First Nat. Bank v. Bridgeport Trust Co.* 117 Fed. 969.

## CHAPTER CXXXIII.

### MOTION TO REMAND.

#### *By Whom Made.*

The motion to remand must be made by the plaintiff in the suit, as the party removing is estopped from making it (Tod v. Cleveland & M. Valley R. Co. 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; Long v. Long, 73 Fed. 372; Edwards v. Connecticut Mut. L. Ins. Co. 20 Fed. 452; Cowley v. Northern P. R. Co. 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 127; Empire Min. Co. v. Propeller Tow-Boat Co. 108 Fed. 903; Philadelphia & B. Face Brick Co. v. Warford, 123 Fed. 843), unless the court *a quo* had no jurisdiction, then he may dismiss (Tootte v. Coleman, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41-45; Swift v. Philadelphia & R. R. Co. 58 Fed. 858; see Purdy v. Wallace, Muller & Co. 81 Fed. 515).

#### *Effect Of.*

It is equivalent to a special plea to the jurisdiction (Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 384, 28 L. ed. 464, 4 Sup. Ct. Rep. 510; Phillips v. Western Terra Cotta Co. 174 Fed. 873), and an order refusing it is subject to reconsideration until final judgment (Missouri P. R. Co. v. Fitzgerald, 160 U. S. 580, 40 L. ed. 542, 16 Sup. Ct. Rep. 389). In considering the motion the presumption is against the party objecting to the jurisdiction. Evers v. Watson, 156 U. S. 531, 39 L. ed. 522, 15 Sup. Ct. Rep. 430.

The petition for removal is a part of the record (Supreme Lodge, K. P. v. Wilson, 14 C. C. A. 264, 30 U. S. App. 234; 66 Fed. 785), and the jurisdictional facts set out in the petition are presumed to be true on motion to remand, and unless evidence is introduced to contradict them, or the record shows

the contrary, the remand will be refused. *Durkee v. Illinois C. R. Co.* 81 Fed. 1; *Loop v. Winters*, 115 Fed. 362; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896.

They are not put in issue by a mere motion to remand. *Ibid.*

### *Time to Be Made.*

We have seen that the motion to remand must be made promptly,—especially where the ground of the motion is a failure to remove the case in time, which is not fundamentally jurisdictional; and this is true, where the motion would be made, on any irregularity, which may be waived by acquiescence or delay. *Wyly v. Richmond & D. R. Co.* 63 Fed. 487; *Tod v. Cleveland & M. Valley R. Co.* 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; see *Collins v. Stott*, 76 Fed. 613. Of course, if the objection goes to some fundamental ground of jurisdiction, it would be the duty of the court, under section 5 of the act of 1875, to remand the cause at any time, when it appeared that the suit did not involve a controversy properly within the jurisdiction. *Indiana v. Tolleston Club*, 53 Fed. 18; *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 85 Fed. 2; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510; *International & G. N. R. Co. v. Hoyle*, 79 C. C. A. 128, 149 Fed. 180–182; *Broadway Ins. Co. v. Chicago, G. W. R. Co.* 101 Fed. 510; *American Bridge Co. v. Hunt*, 64 C. C. A. 548, 130 Fed. 302. See sec. 37, chap. 3, New Code, embodying sec. 5, act of 1875, effective January 1st, 1912.

In discussing what power the Federal court had between petition to remove and the removal, we spoke of the right to remand within that period, to which you are referred.

### *What Acts May Waive the Right to Remand.*

When the ground for remanding is of such a nature that it may be waived, then any act of the plaintiff after removal, recognizing the jurisdiction of the Federal court, would have that effect, as entering a general appearance in the Federal court (*Corwin Mfg. Co. v. Henrici Washer Co.* 151 Fed. 938;

Foulk v. Gray, 120 Fed. 156; Moyer v. Chicago, M. & St. P. R. Co. 168 Fed. 105; Re Moore, 209 U. S. 490, 491, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, 14 A. & E. Ann. Cas. 1164; Louisville & N. R. Co. v. Fisher, 11 L.R.A.(N.S.) 926, 83 C. C. A. 584, 155 Fed. 68); or delay on motion to remand (Wyly v. Richmond & D. R. Co. 63 Fed. 487; Tod v. Cleveland & M. Valley R. Co. 12 C. C. A. 521, 22 U. S. App. 707, 65 Fed. 145; Mulcahey v. Lake Erie & W. R. Co. 69 Fed. 172; Proctor Coal Co. v. United States Fidelity & G. Co. 158 Fed. 211). However, not to give the court jurisdiction if it had none. Indiana ex rel. Muncie v. Lake Erie & W. R. Co. 85 Fed. 1.

It is held in Parkinson v. Barr, 105 Fed. 82-83, that the plaintiff appearing in the Federal court by asking to file an amended complaint did not waive his right to move to remand. See Frisbie v. Chesapeake & O. R. Co. 57 Fed. 1; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 83.

Again (Collins v. Stott, 76 Fed. 613), the plaintiff was allowed to withdraw his pleading and move to remand.

### *Form of Motion to Remand.*

**Title as in suit.**

In the Circuit Court of the United  
States for the.....District of  
.....

**And now comes the plaintiff and moves the court to remand the above entitled cause to the State court from whence it was removed for trial for the following reasons:**

Because some of the defendants herein are residents and citizens of the State of.....and plaintiff is a resident and citizen of the State of....., or a corporation duly incorporated under and by virtue of the laws of ....., and that there is involved in this suit no separable controversy which is wholly between citizens of another state on the one hand and citizens of the State of.....on the other hand, all of which facts are apparent in the record in this cause.

Wherefore plaintiff says this court has no jurisdiction to try and determine this case and prays that the same may be remanded to.....district court of the State of.....from whence it came.

R. F.,  
Solicitor, etc.

See *Parkinson v. Barr*, 105 Fed. 82; *Weldon v. Fritzlen*, 128 Fed. 611; *Carothers v. McKinley, Min. & Smelting Co.* 122 Fed. 305.

Or you may set up that defendant, who removes the cause on the ground that he is a nonresident of the State, is in truth and fact a resident and citizen of the State, and, therefore, the diversity of citizenship, upon which the jurisdiction is claimed, does not exist, but, in fact, the controversy is wholly between citizens of the State. (*Helena Power Transmission Co. v. Spratt*, 146 Fed. 311), or that there was no fraudulent joinder of parties, as alleged. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 751; *Kelly v. Chicago & A. R. Co.* 122 Fed. 286. Or that a party claiming to be an alien is a naturalized citizen of the United States and a citizen of the State of suit where the suit was brought; subsequent change would not affect the jurisdiction. *Harcovic v. Standard Oil Co.* 105 Fed. 785. Or that it is not shown from the claims set up that it arises under the Constitution and laws of the United States, or is dependent for recovery upon a proper construction or application of either, etc. See *New Castle v. Postal Teleg. Cable Co.* 152 Fed. 572; *Mayo v. Dockery*, 108 Fed. 899; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 107, 39 L. ed. 87, 15 Sup. Ct. Rep. 34; *Walker v. Collins*, 167 U. S. 59, 42 L. ed. 76, 17 Sup. Ct. Rep. 738.

Or that the suit was not one that could have been originally brought in the Federal court. See authorities below. Or that amount was not sufficient. *New Castle v. Western U. Teleg. Co.* 152 Fed. 569-571 and cases cited.

As we have seen, a dismissal as to the removing defendant gives the right to remand. *Youtsey v. Hoffman*, 108 Fed. 699; *Cassidy v. Atlanta & C. Air Line R. Co.* 109 Fed. 673.

If the jurisdiction is doubtful on a motion to remand, it should be remanded. *McKown v. Kansas & T. Coal Co.* 105 Fed. 657; *Kessinger v. Vannatta*, 27 Fed. 890; *Nash v. McNamara*, 145 Fed. 542; *Plant v. Harrison*, 101 Fed. 307; *Ernst v. American Spirits Mfg. Co.* 114 Fed. 981; *Mathews Slate Co. v. Mathews*, 148 Fed. 490. And the duty to remand

should not be affected by the fact that no cause of action is stated; that is a question for the State court. *Broadway Ins. Co. v. Chicago, G. W. R. Co.* 101 Fed. 507. Nor can the consolidation of a suit, with one pending in the Federal court, affect the right to remand. *Colburn v. Hill*, 41 C. C. A. 467, 101 Fed. 500. When a suit is prosecuted in a State court of equity, and, if removed, would fall on the law side of the Federal court, then it should be remanded. *Gombert v. Lyon*, 80 Fed. 305; *Cates v. Allen*, 149 U. S. 460, 37 L. ed. 808, 13 Sup. Ct. Rep. 883, 977. Consent cannot remand. *Lawton v. Blitch*, 30 Fed. 641.

### *How Issue Joined and Tried.*

We have already seen how the issue is to be joined and tried when diverse citizenship is put in issue.

The existence of a Federal question, we have seen, must appear in the case as made by the plaintiff's petition in the State court, and cannot be raised by the petition to remove; so the issue in the motion to remand must rest upon the statements in plaintiff's original or amended petition in the State court.

The burden is on the removing party (*Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232), to sustain jurisdiction. See *Thresher v. Western U. Teleg. Co.* 148 Fed. 649.

### *Fraudulent Joinder.*

Again, we have seen that the plaintiff cannot fraudulently join parties as defendants in order to evade Federal jurisdiction and prevent removal. If the fact exists, the petition for removal may set it up, and the issue is to be tried in the Federal court. *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 303, 34 L. ed. 964, 11 Sup. Ct. Rep. 306; *Carlisle v. Sunset Teleph. & Teleg. Co.* 116 Fed. 896; *McGuire v. Great Northern R. Co.* 153 Fed. 434; *Kelly v. Chicago & A. R. Co.* 122 Fed. 289; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Prince v. Illinois C. R. Co.* 98 Fed. 1. The allegation of the jurisdictional fact, being taken as *prima facie* true, is

sufficient for the removal. *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 170; *Kelly v. Chicago & A. R. Co.* 122 Fed. 289; *Ross v. Erie R. Co.* 120 Fed. 703. See sec. 37, chap. 3 of the New Code.

When the petition for removal alleges the fact of a fraudulent joinder, it is the practice of some of the Federal courts to require an issue to be raised, or, upon failure to do so, the truth of the petition is presumed, and the case will not be remanded; while, in other jurisdictions, the petition is treated as traversed without express denial, and on motion to remand to place the burden of proving such allegations on the defendant. *Boatner v. American Exp. Co.* 122 Fed. 714.

This latter ruling is based on *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203, in which the Supreme Court says that the removal cannot be maintained unless the petitioner both alleges and proves that the defendants were wrongfully joined for the purpose of preventing a removal. *Wecker v. National Enameling & Stamping Co.* 204 U. S. 182, 183, 51 L. ed. 434, 435, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 210, 211.

There is no question that an action brought in a State court for a tort against several, or where the plaintiff has a legal right to bring a joint action, that neither of the defendants can remove the same to a Federal court, even though the plaintiff may have brought the action against each defendant separately. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Knuth v. Butte, Electric R. Co.* 148 Fed. 73; *Atlantic Coast Line R. Co. v. Daniels*, 175 Fed. 302.

As to how the suit is to be brought is entirely within the discretion of the plaintiff; so, when the petition is filed, if fraudulent joinder be charged and the cause removed, the Federal court must determine the right of removal by the petition as filed by the plaintiff; that is, it must act on the record as made in the State court when the petition for removal was filed. It will so act when a motion to remand is made, unless the moving petitioner proves his allegations of fraudulent joinder. This right to elect whether the suit shall be joint or several must be overcome when the suit is brought against

several defendants, by the removing defendant, by allegation and proof that the joinder was fraudulent, otherwise the suit as brought must control upon motion to remand. *Louisville R. Co. v. Wangelin*, 132 U. S. 601, 33 L. ed. 475, 10 Sup. Ct. Rep. 203; *Charman v. Lake Erie & W. R. Co.* 105 Fed. 449; *Bryce v. Southern R. Co.* 122 Fed. 710; *Prince v. Illinois C. R. Co.* 98 Fed. 2; *Iowa Lillooet Gold Min. Co. v. Bliss*, 144 Fed. 452; *Alabama, G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 750, 751.

So we see that the issue is raised between the petition for the plaintiff and the allegations for removal, and it is not necessary to specially deny the allegations of the removal petition in order to remand.

### *Nature of Proof.*

In order to justify a removal on the ground of fraudulent joinder, it must appear not only that they were not joined for that purpose, but that no cause of action is stated against them, or that they are, in law, improperly joined, or that the allegations of the petition joining therein a common liability are so palpably untrue or unfounded as to make the want of good faith of the plaintiff apparent. *Winters v. Drake*, 102 Fed. 550; *Hukill v. Maysville & B. S. R. Co.* 72 Fed. 745, 746; *Warax v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 638; *Shane v. Butte Electric R. Co.* 150 Fed. 801; *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757; *McGuire v. Great Northern R. Co.* 153 Fed. 434.

The burden of proof is on the removing party to show the fraudulent joinder. *Swann v. Mutual Reserve Fund Life Asso.* 116 Fed. 232; *Thresher v. Western U. Teleg. Co.* 148 Fed. 649; *Bryce v. Southern R. Co.* 122 Fed. 709; *Union Terminal R. Co. v. Chicago, B. & Q. R. Co.* 119 Fed. 211; *Woodson County v. Toronto Bank*, 128 Fed. 157. As to causes for remanding, see *International & G. N. R. Co. v. Hoyle*,



79 C. C. A. 128, 149 Fed. 180; Utah-Nevada Co. v. De Lamar, 75 C. C. A. 1, 145 Fed. 505; Mathews Slate Co. v. Mathews, 148 Fed. 490; Goldberg, B. & Co. v. German Ins. Co. 152 Fed. 832; Helena Power Transmission Co. v. Spratt, 146 Fed. 311; People's United States Bank v. Goodwin, 160 Fed. 727.

If a cause is properly removable it will not be remanded because the procedure was irregular. Bryant Bros. Co. v. Robinson, 79 C. C. A. 259, 149 Fed. 321.

S. Eq.—56.

## CHAPTER CXXXIV.

### RECASTING PLEADINGS

In jurisdictions, where legal and equitable causes of action may be joined, we have often causes removed from the State to the Federal courts in this condition. The equitable cause cannot be tried on the law side, nor the action at law on the equity side, nor even an equitable defense permitted. *Northern P. R. Co. v. Paine*, 119 U. S. 563, 30 L. ed. 514, 7 Sup. Ct. Rep. 323; *Bennett v. Butterworth*, 11 How. 674, 675, 13 L. ed. 861, 862; *Pettus v. Smith*, 117 Fed. 967; *India Rubber Co. v. Consolidated Rubber Tire Co.* 117 Fed. 354; *Mulqueen v. Schlichter Jute Cordage Co.* 108 Fed. 931; *Berkey v. Cornell*, 90 Fed. 717; *Davis v. Davis*, 18 C. C. A. 438, 30 U. S. App. 723, 72 Fed. 83, 84; *Lerma v. Stevenson*, 40 Fed. 359; *Smythe v. Henry*, 41 Fed. 715; *Hatcher v. Hendrie & B. Mfg. & Supply Co.* 68 C. C. A. 19, 133 Fed. 271. So it becomes necessary to recast the pleadings in order that the equitable cause of action may be prosecuted according to the procedure and usages of courts of equity. *Thornton N. Motley Co. v. Detroit Steel & Spring Co.* 130 Fed. 396; *Re Foley*, 76 Fed. 390; *Bryant Bros. Co. v. Robinson*, 79 C. C. A. 259, 149 Fed. 321; *Stockton v. Oregon Short Line R. Co.* 170 Fed. 633; *Fletcher v. Burt*, 63 C. C. A. 201, 126 Fed. 619-621; *Phelps v. Elliott*, 23 Blatchf. 470, 26 Fed. 881; *Benedict v. Williams*, 20 Blatchf. 276, 10 Fed. 208; *Hurt v. Hollingsworth*, 100 U. S. 103, 25 L. ed. 570; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689. As the case becomes one in law or equity as the nature of the case demands. *North Alabama Development Co. v. Ormond*, 5 C. C. A. 22, 13 U. S. App. 215, 55 Fed. 20; *Wilson v. Smith*, 66 Fed. 81. See *Detroit v. Detroit City R. Co.* 55 Fed. 569. Where the case was in Chancery in the State court and removed and by the State

equity rules the defendant may have affirmative relief set up in his answer, the defendant need not recast his pleadings by setting up his case by cross bill.

When the case is removed, then the clerk docket it. If the case is purely equitable, such as mere foreclosure of a mortgage, the clerk by request can at once assign it to the equity docket, but if purely legal, such an action to try title or simply recover money, he may assign it at once to the law docket. Should the case be equitable in its nature and not placed on the equity docket, either party may move the court for a transfer to the proper docket. *United States Bank v. Lyon County*, 48 Fed. 634; *Dancel v. United Shoe Machinery Co.* 120 Fed. 840. You may use the following form:

Title as in case.

In the United States Circuit Court  
for the District of....., sitting at  
.....

And now comes.....(plaintiff or defendant) in the above cause and shows to the court that this is a suit to recover certain taxes and to foreclose a tax lien thereon for the amount of said taxes, with a prayer for foreclosure of the lien (or whatever may be the cause of action showing that it is a case in equity), and the.....says that the relief sought can be more fully granted in equity than on the law side of this Honorable Court, wherefore he prays that said cause be transferred to the equity docket for trial.

R. F.,  
Attorney of Record.

Issue may be taken on the motion, and the case shown to be fully remediable at law.

If the cause is transferred to the equity side of the docket, the court may order the pleadings changed to conform to the equity rules, or it may be required on the motion of either party, in which event the court orders the bill to be filed by a certain time and the defendant to demur, plead or answer by a certain other time, usually pursuing the time permitted by the rules. *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. ed. 569.

The plaintiff may recast his pleading as soon as the order is made transferring his case to the equity side, without any order of court or motion to require or permit it. You must bear in mind that as soon as your case is docketed as an equity suit, you must pursue the equity rules in preparing it for hear-

ing on the merits, and you at once become subject to the penalties for noncompliance with them. Rule 19 C. C. A.; Utah-Nevada Co. v. De Lamar, 75 C. C. A. 1, 145 Fed. 507.

If the plaintiff elects to stand on his pleading as it comes from the State court, which in a simple foreclosure you may do if your petition has been properly drawn in the State court (Phelps v. Elliott, 23 Blatchf. 470, 26 Fed. 883), you must so state in answer to the order to replead if one has been made, and file your reply as notice to the defendant to answer within the rules. Thus, where a case in equity in a State court has been removed, and the chancery rules of that State permit affirmative relief to be set up by way of cross bill in the answer, you need not file cross bill. Detroit v. Detroit City R. Co. 55 Fed. 569, 570.

In case no order has been made to recast your pleadings, and you have elected to stand on your petition as filed in the State court, you should at once notify the defendant so that he may demur, plead, or answer by the next rule day as required, and if so notified and he does not plead under the rules, you may enter a judgment *pro confesso*.

Sometimes the defendant has, in advance of the day he is required to plead in the State court, filed a demurrer and general issue in said court, and the case, though an equitable one, comes up to the Federal court when removed with the issue so joined. Such a paper is neither good as a demurrer or answer to a suit in equity in the Federal court, and if the cause has been transferred to the equity side, will not be noticed, and consequently will not prevent a judgment *pro confesso*, if the defendant has not plead, demurrer, or answered under the rules. The defendant being notified that the cause is upon the equity side of the docket, and that the plaintiff stands upon his pleading as it came from the State court, or that the plaintiff has recast his pleadings and filed his bill, must demur, plead, or answer within the rules as heretofore explained.

But sometimes the case as it comes from the State court carries two distinct causes of action: one equitable and the other legal. It may be necessary to divide them, retaining the legal cause of action on the law side and transferring the equitable cause to the equity side, and thus have the divided

suits pending at the same time. C. C. rule 19, 75 C. C. A. 1, 145 Fed. 507; Perkins v. Hendryx, 23 Fed. 418; Lacroix v. Lyons, 27 Fed. 403; Stockton v. Oregon Short Line R. Co. 170 Fed. 633; Utah-Nevada Co. v. De Lamar, 75 C. C. A. 1, 145 Fed. 505-507.

To illustrate: You may have a simple money claim against the defendant, evidenced by a note, and you may have a claim evidenced by a note, but the latter secured by a mortgage. You may sue the defendant in the State court on both causes of action in the same suit. The defendant appears in the State court and on sufficient ground removes the cause to the Federal court; here there is no question, you must divide your suit and carry your foreclosure to the equity side. To do this you must necessarily recast your pleadings.

If each note is in excess of two thousand dollars, exclusive of interest and costs, there is no difficulty as you have the necessary amount to give the Federal court jurisdiction on either side of the divided system. But suppose neither note is for two thousand dollars, or one of the notes was under and the other exceed the jurisdictional amount, clearly the court must remand the case, unless the plaintiff waives the foreclosure and sues on the law side for the aggregated amount of the two notes. If one note is in excess and the other under the amount, the Federal court by the removal may retain jurisdiction of the note in excess of two thousand dollars, but cannot retain jurisdiction of the other, unless the equitable phase of the case has been abandoned and the amounts aggregated.

Often cases go up from the State court in which ancillary process has been sued out to preserve the subject-matter or status until the judgment at law can be recovered. If in such cases the ancillary proceeding is an equitable proceeding, such as an injunction, the pleadings must be recast and the injunction carried to the equity side of the docket.

Again, your cause of action may be legal, but an equitable remedy be sought. This fact would carry your case to the equity docket, for, as we have seen, courts of equity take jurisdiction, both when the cause of action or the remedy sought is equitable. However, it seems that when a case is pending in a State equity court, which, if removed, would, by the nature

of the case, go to the law side, the court should remand and not require the pleading to be recast. *Gombert v. Lyon*, 80 Fed. 305; *Cates v. Allen*, 149 U. S. 460, 37 L. ed. 808, 13 Sup. Ct. Rep. 883, 977.

If the object of the suit is to obtain a perpetual injunction, or any other essential equitable remedy, you must go to the equity side, even though damages are involved and are prayed for. *Du Pont v. Abel*, 81 Fed. 535.

# APPENDIX.

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## THE JUDICIAL CODE.

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### CHAPTER ONE.

#### DISTRICT COURTS—ORGANIZATION.

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|---|---|
| <p><b>Sec.</b></p> <ol style="list-style-type: none"> <li>1. District courts established; appointment and residence of judges.</li> <li>2. Salaries of district judges.</li> <li>3. Clerks.</li> <li>4. Deputy clerks.</li> <li>5. Criers and bailiffs.</li> <li>6. Records; where kept.</li> <li>7. Effect of altering terms.</li> <li>8. Trials not discontinued by new term.</li> <li>9. Court always open as courts of admiralty and equity.</li> <li>10. Monthly adjournments for trial of criminal causes.</li> <li>11. Special terms.</li> <li>12. Adjournment in case of nonattendance of judge.</li> <li>13. Designation of another judge in case of disability of judge.</li> </ol> | <p><b>Sec.</b></p> <ol style="list-style-type: none"> <li>14. Designation of another judge in case of an accumulation of business.</li> <li>15. When designation to be made by Chief Justice.</li> <li>16. New appointment and revocation.</li> <li>17. Designation of district judge in aid of another judge.</li> <li>18. When circuit judge may be designated to hold district court.</li> <li>19. Duty of district and circuit judge in such cases.</li> <li>20. When district judge is interested or related to parties.</li> <li>21. When affidavit of personal bias or prejudice of judge is filed.</li> <li>22. Continuance in case of vacancy in office.</li> <li>23. Districts having more than one judge; division of business.</li> </ol> |
|---|---|

Sec. 1. In each of the districts described in chapter five, there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge; except that in the northern district of California, the northern district of Illinois, the district of Maryland, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York, three additional district judges: *Provided*, That whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said dis-

trict: *Provided further*, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: *Provided further*, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

Sec. 2. Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments.

Sec. 3. A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

Sec. 4. Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 5. The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes.

Sec. 6. The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

Sec. 7. No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof.

Sec. 8. When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.



Sec. 9. The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Sec. 10. District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

Sec. 11. A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term.

Sec. 12. If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

Sec. 13. When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed.

Sec. 14. When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certif-

icate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein.

Sec. 15. If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.

Sec. 16. Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.

Sec. 17. It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit.

Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court.

Sec. 19. It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

Sec. 20. Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either

party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.

Sec. 21. Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

Sec. 22. When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess the powers conferred by, and be subject to the provisions contained in, section nineteen.

Sec. 23. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

## CHAPTER TWO.

## DISTRICT COURTS—JURISDICTION.

Sec.

## 24. Original jurisdiction.

- Par. 1. Where the United States are plaintiffs; and of civil suits at common law or in equity.
2. Of crimes and offenses.
3. Of admiralty causes, seizures, and prizes.
4. Of suits under any law relating to the slave trade.
5. Of cases under internal revenue, customs, and tonnage laws.
6. Of suits under postal laws.
7. Of suits under the patent, the copyright, and the trade-mark laws.
8. Of suits for violation of interstate commerce laws.
9. Of penalties and forfeitures.
10. Of suits on debentures.
11. Of suits for injuries on account of acts done under laws of the United States.
12. Of suits concerning civil rights.
13. Of suits against persons having knowledge of conspiracy, etc.
14. Of suits to redress the deprivation, under color of law, of civil rights.

Sec.

## 24. Original jurisdiction—Cont'd.

- Par. 15. Of suits to recover certain offices.
16. Of suits against national-banking associations.
17. Of suits by aliens for torts.
18. Of suits against consuls and vice-consuls.
19. Of suits and proceedings in bankruptcy.
20. Of suits against the United States.
21. Of suits for the unlawful inclosure of public lands.
22. Of suits under immigration and contract-labor laws.
23. Of suits against trusts, monopolies, and unlawful combinations.
24. Of suits concerning allotments of land to Indians.
25. Of partition suits where United States is joint tenant.
25. Appellate jurisdiction under Chinese-exclusion laws.
26. Appellate jurisdiction over Yellowstone National Park.
27. Jurisdiction of crimes on Indian reservations in South Dakota.

Sec. 24. The district courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, ex-

clusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: *Provided, however,* That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

Second. Of all crimes and offenses cognizable under the authority of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fourth. Of all suits arising under any law relating to the slave trade.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

Sixth. Of all cases arising under the postal laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the

United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

Eighteenth. Of all suits against consuls and vice consuls.

Nineteenth. Of all matters and proceedings in bankruptcy.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all

set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided, however,* That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: *And provided further,* That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

Sec. 25. The district courts shall have appellate jurisdiction of the

judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

Sec. 26. The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

Sec. 27. The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all actions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

### CHAPTER THREE.

#### DISTRICT COURTS—REMOVAL OF CAUSES.

Sec.	Sec.
28. Removal of suits from State to United States district courts.	34. Removal of suits by aliens.
29. Procedure for removal.	35. When copies of records are refused by clerk of State court.
30. Suits under grants of land from different States.	36. Previous attachment bonds, orders, etc., remain valid.
31. Removal of causes against persons denied any civil rights, etc.	37. Suits improperly in district court may be dismissed or remanded.
32. When petitioner is in actual custody of State court.	38. Proceedings in suits removed.
33. Suits and prosecutions against revenue officers, etc.	39. Time for filing record; return of record, how enforced.

Sec. 28. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the



United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Sec. 29. Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the grounds of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days

from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

Sec. 30. If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Sec. 31. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts

and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

Sec. 32. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

Sec. 33. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial

into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or other process except *capias*, the clerk of the district court shall issue a writ of *certiorari* to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by *capias* or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non *prosequitur* may be rendered against him, with costs for the defendant.

Sec. 34. Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a nonresident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner

as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

Sec. 35. In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

Sec. 36. When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Sec. 37. If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

Sec. 38. The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.

Sec. 39. In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy,

said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding such State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

#### CHAPTER FOUR.

##### DISTRICT COURTS—MISCELLANEOUS PROVISIONS.

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| <p>Sec.</p> <p>40. Capital cases; where triable.</p> <p>41. Offenses on the high seas, etc., where triable.</p> <p>42. Offenses begun in one district and completed in another.</p> <p>43. Suits for penalties and forfeitures, where brought.</p> <p>44. Suits for internal-revenue taxes, where brought.</p> <p>45. Seizures, where cognizable.</p> <p>46. Capture of insurrectionary property, where cognizable.</p> <p>47. Certain seizures cognizable in any district into which the property is taken.</p> <p>48. Jurisdiction in patent cases.</p> <p>49. Proceedings to enjoin Comptroller of the Currency.</p> <p>50. When a part of several defendants can not be served.</p> <p>51. Civil suits; where to be brought.</p> <p>52. Suits in States containing more than one district.</p> | <p>Sec.</p> <p>53. Districts containing more than one division; where suit to be brought; transfer of criminal cases.</p> <p>54. Suits of a local nature, where to be brought.</p> <p>55. When property lies in different districts in same State.</p> <p>56. When property lies in different States in same circuit; jurisdiction of receiver.</p> <p>57. Absent defendants in suits to enforce liens, remove clouds on titles, etc.</p> <p>58. Civil causes may be transferred to another division of district by agreement.</p> <p>59. Upon creation of new district or division, where prosecution to be instituted or action brought.</p> |
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Sec.	Sec.
60. Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.	64. Jurisdiction of district courts in cases transferred from territorial courts.
61. Commissioners to administer oaths to appraisers.	65. Receivers to manage property according to State laws.
62. Transfer of records to district court when a Territory becomes a State.	66. Suits against receiver.
63. District judge shall demand and compel delivery of records of territorial court.	67. Certain persons not to be appointed or employed as officers of courts.
	68. Certain persons not to be masters or receivers.

Sec. 40. The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

Sec. 41. The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Sec. 42. When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

Sec. 43. All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

Sec. 44. Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

Sec. 45. Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

Sec. 46. Proceedings for the condemnation of any property captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

Sec. 47. Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other

parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as full jurisdiction over such proceedings as if the seizure was made in that district.

Sec. 48. In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Sec. 49. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

Sec. 50. Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.

Sec. 51. Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

Sec. 52. When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the



duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State.

Sec. 53. When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States district court in such division.

Sec. 54. In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

Sec. 55. Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

Sec. 56. Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the

circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Sec. 57. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting

aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

Sec. 58. Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Sec. 59. Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Sec. 60. The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the

circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

Sec. 61. Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

Sec. 62. When any Territory is admitted as a State, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said State.

Sec. 63. It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law.

Sec. 64. When any Territory is admitted as a State, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the trial courts of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same.

Sec. 65. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property

according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

Sec. 66. Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Sec. 67. No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court.

Sec. 68. No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

## CHAPTER FIVE.

### DISTRICT COURTS—DISTRICTS, AND PROVISIONS APPLICABLE TO PARTICULAR STATES.

Sec.  
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Sec. 69. The United States are divided into judicial districts as follows:

Sec. 70. The State of Alabama is divided into three judicial districts, to be known as the northern, middle, and southern districts of Alabama. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the northeastern division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherokee, De Kalb, Etowah, Marshall, and Saint Clair, which shall constitute the middle division of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall constitute the Jasper division of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the western division of said district. Terms of the district court for the northeastern division shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February and the third Tuesday in October: *Provided*, That suitable rooms and accommodations for holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gadsden on the first Tuesdays in February and August: *Provided*, That suitable rooms and accommodations for the holding court at Gadsden shall be furnished free of expense to the Government; for the southern division, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the Jasper division, at Jasper on the second Tuesdays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Chambers, Coosa, Covington, Crenshaw, Elmore, Lee, Lowndes, Macon, Montgomery, Pike, Randolph, Russell, and Tallapoosa, which shall con-

stitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry, and Houston, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Montgomery on the first Tuesdays in May and December; and for the southern division, at Dothan on the first Mondays in June and December. The clerk for the middle district shall maintain an office, in charge of himself or a deputy, at Dothan, which shall be open at all times for the transaction of the business of said division. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the northern division of said district. Terms of the district court for the southern division shall be held at Mobile on the fourth Mondays in May and November; and for the northern division, at Selma on the first Mondays in May and November.

Sec. 71. The State of Arkansas is divided into two districts, to be known as the eastern and western districts of Arkansas. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Sevier, Howard, Little River, Pike, Hempstead, Miller, Lafayette, Columbia, Nevada, Ouachita, Union, and Calhoun, which shall constitute the Texarkana division of said district; also the territory embraced on the date last mentioned in the counties of Polk, Scott, Yell, Logan, Sebastian, Franklin, Crawford, Washington, Benton, and Johnson, which shall constitute the Fort Smith division of said district; also the territory embraced on the date last mentioned in the counties of Baxter, Boone, Carroll, Madison, Marion, Newton, and Searcy, which shall constitute the Harrison division of said district. Terms of the district court for the Texarkana division shall be held at Texarkana on the second Mondays in May and November; for the Fort Smith division, at Fort Smith on the second Mondays in January and June; and for the Harrison division, at Harrison on the second Mondays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Lee, Phillips, Saint Francis, Cross, Monroe, and Woodruff, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Independence, Cleburne, Stone, Izard, Sharp, and Jackson, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Crittenden, Clay, Craighead, Greene, Mississippi, Poinsett, Fulton, Randolph, and Lawrence, which shall constitute the Jonesboro division of said district; and also the territory embraced on the date last mentioned in the counties of Arkansas, Ashley, Bradley, Chicot, Clark, Cleveland, Conway, Dallas, Desha, Drew, Faulkner, Garland, Grant, Hot Spring, Jefferson, Lincoln, Lonoke, Montgomery, Perry, Pope, Prairie, Pulaski, Saline, Van Buren, and White, which shall

constitute the western division of said district. Terms of the district court for the eastern division shall be held at Helena on the second Monday in March and the first Monday in October; for the northern division, at Batesville on the fourth Monday in May and the second Monday in December; for the Jonesboro division, at Jonesboro on the second Mondays in May and November; and for the western division, at Little Rock on the first Monday in April and the third Monday in October. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Little Rock, at Helena, at Jonesboro, and at Batesville, which shall be kept open at all times for the transaction of the business of the court. And the clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Fort Smith, at Harrison, and at Texarkana, which shall be kept open at all times for the transaction of the business of the court.

Sec. 72. The State of California is divided into two districts, to be known as the northern and southern districts of California. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, and Ventura, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Fresno on the first Monday in May and the second Monday in November; and for the southern division, at Los Angeles, on the second Monday in January and the second Monday in July, and at San Diego on the second Mondays in March and September. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Mono, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba. Terms of the district court for the northern district shall be held at San Francisco on the first Monday in March, the second Monday in July, and the first Monday in November; at Sacramento on the second Monday in April; and at Eureka on the third Monday in July.

Sec. 73. The State of Colorado shall constitute one judicial district, to be known as the district of Colorado. Terms of the district court shall be held at Denver on the first Tuesdays in May and November; at Pueblo on the first Tuesday in April; and at Montrose on the second Tuesday in September.

Sec. 74. The State of Connecticut shall constitute one judicial district, to be known as the district of Connecticut. Terms of the district court shall be held at New Haven on the fourth Tuesdays in February and



September, and at Hartford on the fourth Tuesday in May and the first Tuesday in December.

Sec. 75. The State of Delaware shall constitute one judicial district, to be known as the district of Delaware. Terms of the district court shall be held at Wilmington on the second Tuesdays in March, June, September, and December.

Sec. 76. The State of Florida is divided into two districts, to be known as the northern and southern districts of Florida. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baker, Bradford, Brevard, Citrus, Clay, Columbia, Dade, De Soto, Duval, Hamilton, Hernando, Hillsboro, Lake, Lee, Madison, Manatee, Marion, Monroe, Nassau, Orange, Osceola, Palm Beach, Pasco, Polk, Putnam, Saint John, Sumter, Suwanee, Saint Lucie, and Volusia. Terms of the district court for the southern district shall be held at Ocala on the third Monday in January; at Tampa on the second Monday in February; at Key West on the first Mondays in May and November; at Jacksonville on the first Monday in December; at Fernandina on the first Monday in April; and at Miami on the fourth Monday in April. The district court for the southern district shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alachua, Calhoun, Escambia, Franklin, Gadsden, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Santa Rosa, Taylor, Wakulla, Walton, and Washington. Terms of the district court for the northern district shall be held at Tallahassee on the second Monday in January; at Pensacola on the first Mondays in May and November; at Marianna on the first Monday in April; and at Gainesville on the second Mondays in June and December.

Sec. 77. The State of Georgia is divided into two districts, to be known as the northern and southern districts of Georgia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Campbell, Carroll, Clayton, Cobb, Coweta, Cherokee, DeKalb, Douglas, Dawson, Fannin, Fayette, Fulton, Forsyth, Gilmer, Gwinnett, Hall, Henry, Lumpkin, Milton, Newton, Pickens, Rockdale, Spalding, Towns, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Banks, Clarke, Elbert, Franklin, Greene, Habersham, Hart, Jackson, Morgan, Madison, Oglethorpe, Oconee, Rabun, Stephens, Walton, and White, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Chattahoochee, Clay, Early, Harris, Heard, Meriwether, Marion, Muscogee, Quitman, Randolph, Schley, Stewart, Talbot, Taylor, Terrell, Troup, and Webster, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bartow, Chattooga, Catoosa, Dade, Floyd, Gordon, Haralson, Murray, Paulding, Polk, Walker, and Whitfield, which shall constitute the northwestern division of said dis-

trict. Terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October; for the eastern division, at Athens on the second Monday in April and the first Monday in November; for the western division, at Columbus on the first Mondays in May and December; and for the northwestern division, at Rome on the third Mondays in May and November. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Athens, at Columbus, and at Rome, which shall be kept open at all times for the transaction of the business of the court. The southern district shall include the territory embraced on the said first day of July, nineteen hundred and ten, in the counties of Appling, Bulloch, Bryan, Camden, Chatham, Emanuel, Effingham, Glynn, Jeff Davis, Liberty, Montgomery, McIntosh, Screven, Tatnall, Toombs, and Wayne, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Baldwin, Bibb, Butts, Crawford, Dodge, Dooly, Hancock, Houston, Jasper, Jones, Laurens, Macon, Monroe, Pike, Pulaski, Putnam, Sumter, Telfair, Twiggs, Upson, Wilcox, and Wilkinson, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Burke, Columbia, Glascock, Jefferson, Jenkins, Johnson, Lincoln, McDuffie, Richmond, Taliaferro, Washington, Wilkes, and Warren, which shall constitute the northeastern division; also the territory embraced on the date last mentioned in the counties of Berrien, Brooks, Charlton, Clinch, Coffee, Decatur, Echols, Grady, Irwin, Lowndes, Pierce, and Ware, which shall constitute the southwestern division; and also the territory embraced on the date last mentioned in the counties of Baker, Ben Hill, Calhoun, Crisp, Colquitt, Dougherty, Lee, Miller, Mitchell, Thomas, Tift, Turner, and Worth, which shall constitute the Albany division. Terms of the district court for the western division shall be held at Macon on the first Mondays in May and October; for the eastern division, at Savannah on the second Tuesdays in February, May, August, and November; for the northeastern division, at Augusta on the first Monday in April and the third Monday in November; for the southwestern division, at Valdosta on the second Mondays in June and December; and for the Albany division, at Albany on the third Mondays in June and December.

Sec. 78. The State of Idaho shall constitute one judicial district, to be known as the district of Idaho. It is divided into four divisions, to be known as the northern, central, southern, and eastern divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bonner, Kootenai, and Shoshone, shall constitute the northern division of said district; and the territory embraced on the date last mentioned in the counties of Idaho, Latah, and Nez Perce, shall constitute the central division of said district; and the territory embraced on the date last mentioned in the counties of Ada, Boise, Blaine, Cassia, Twin Falls, Canyon, Elmore, Lincoln, Owyhee, and Washington, shall constitute the southern division of said district; and the territory embraced on the date last mentioned in the counties of Bannock, Bear

Lake, Bingham, Custer, Fremont, Lemhi, and Oneida, shall constitute the eastern division of said district. Terms of the district court for the northern division of said district shall be held at Coeur d'Alene City on the fourth Monday in May and the third Monday in November; for the central division, at Moscow on the second Monday in May and the first Monday in November; for the southern division, at Boise City on the second Mondays in February and September; and for the eastern division, at Pocatello on the second Mondays in March and October. The clerk of the court shall maintain an office in charge of himself or a deputy at Coeur d'Alene City, at Moscow, at Boise City, and at Pocatello, which shall be open at all times for the transaction of the business of the court.

Sec. 79. The State of Illinois is divided into three districts, to be known as the northern, southern, and eastern districts of Illinois. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cook, Dekalb, Dupage, Grundy, Kane, Kendall, Lake, LaSalle, McHenry, and Will, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Boone, Carroll, Jo Daviess, Lee, Ogle, Stephenson, Whiteside, and Winnebago, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Chicago on the first Mondays in February, March, April, May, June, July, September, October, and November, and the third Monday in December; and for the western division, at Freeport on the third Mondays in April and October. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Chicago and at Freeport, which shall be kept open at all times for the transaction of the business of the court. The marshal for the northern district shall maintain an office in the division in which he himself does not reside and shall appoint at least one deputy who shall reside therein. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bureau, Fulton, Henderson, Henry, Knox, Livingston, McDonough, Marshall, Mercer, Putnam, Peoria, Rock Island, Stark, Tazewell, Warren, and Woodford, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Adams, Bond, Brown, Calhoun, Cass, Christian, Dewitt, Greene, Hancock, Jersey, Logan, McLean, Macon, Macoupin, Madison, Mason, Menard, Montgomery, Morgan, Pike, Sangamon, Schuyler, and Scott, which shall constitute the southern division. Terms of the district court for the northern division shall be held at Peoria on the third Mondays in April and October; for the southern division, at Springfield on the first Mondays in January and June, and at Quincy on the first Mondays in March and September. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at Peoria, at Springfield, and at Quincy, which shall be kept open at all times for the transaction of the business of the court. The marshal for said southern district shall appoint at least one deputy residing in the said northern division, who shall maintain an office at Peoria. The eastern

district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alexander, Champaign, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Douglas, Edgar, Edwards, Effingham, Fayette, Ford, Franklin, Gallatin, Hamilton, Hardin, Iroquois, Jackson, Jasper, Jefferson, Johnson, Kankakee, Lawrence, Marion, Massac, Monroe, Moultrie, Perry, Piatt, Pope, Pulaski, Randolph, Richland, Saint Clair, Saline, Shelby, Union, Vermilion, Wabash, Washington, Wayne, White, and Williamson. Terms of the district court for the eastern district shall be held at Danville on the first Mondays in March and September; at Cairo on the first Mondays in April and October; and at East Saint Louis on the first Mondays in May and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Danville, at Cairo, and at East Saint Louis, which shall be kept open at all times for the transaction of the business of the court, and shall there keep the records, files, and documents pertaining to the court at that place.

Sec. 80. The State of Indiana shall constitute one judicial district, to be known as the district of Indiana. Terms of the district court shall be held at Indianapolis on the first Tuesdays in May and November; at New Albany on the first Mondays in January and July; at Evansville on the first Mondays in April and October; at Fort Wayne on the second Tuesdays in June and December; and at Hammond on the third Tuesdays in April and October. The clerk of the court shall appoint four deputy clerks, one of whom shall reside and keep his office at New Albany, one at Evansville, one at Fort Wayne, and one at Hammond. Each deputy shall keep in his office full records of all actions and proceedings of the district court held at that place.

Sec. 81. The State of Iowa is divided into two judicial districts, to be known as the northern and southern districts of Iowa. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties on Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which shall constitute the Cedar Rapids division; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division, at Fort

Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the central division of said district; also the territory embraced on the date last mentioned in the counties of Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, and Clinton, which shall constitute the Davenport division of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the Ottumwa division of said district. Terms of the district court for the eastern division shall be held at Keokuk on the second Tuesday in April and the third Tuesday in October; for the central division, at Des Moines on the second Tuesday in May and the third Tuesday in November; for the western division, at Council Bluffs on the second Tuesday in March and the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday in March and the first Tuesday in November; for the Davenport division, at Davenport on the fourth Tuesday in April and the first Tuesday in October; and for the Ottumwa division, at Ottumwa on the first Monday after the fourth Tuesday in March, and the first Monday after the third Tuesday in October. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa, for the transaction of the business of said divisions.

Sec. 82. The State of Kansas shall constitute one judicial district, to be known as the district of Kansas. It is divided into three divisions, to be known as the first, second, and third divisions of the district of Kansas. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Atchison, Brown, Chase, Cheyenne, Clay, Cloud, Decatur, Dickinson, Doniphan, Douglas, Ellis, Franklin, Geary, Gove, Graham, Jackson, Jefferson, Jewell, Johnson, Leavenworth, Lincoln, Logan, Lyon, Marion, Marshall, Mitchell, Morris, Nemaha, Norton, Osage, Osborne, Ottawa, Phillips, Pottawatomie, Rawlins, Republic, Riley, Rooks, Russell, Saline, Shawnee, Sheridan, Sherman, Smith, Thomas, Trego, Wabaunsee, Wallace, Washington, and Wyandotte. The second division shall include the territory embraced on the date last mentioned in the counties of Barber, Barton, Butler, Clark, Comanche, Cowley, Edwards, Ellsworth, Finney, Ford, Grant, Gray, Greeley,

Hamilton, Harper, Harvey, Hodgeman, Haskell, Kingman, Kiowa, Kearny, Lane, McPherson, Morton, Meade, Ness, Pratt, Pawnee, Reno, Rice, Rush, Scott, Sedgwick, Stafford, Stevens, Seward, Sumner, Stanton, and Wichita. The third division shall include the territory embraced on the said date last mentioned in the counties of Allen, Anderson, Bourbon, Cherokee, Coffey, Chautauqua, Crawford, Elk, Greenwood, Labette, Linn, Miami, Montgomery, Neosho, Wilson, and Woodson. Terms of the district court for the first division shall be held at Leavenworth on the second Monday in October; at Topeka on the second Monday in April; at Kansas City on the second Monday in January and the first Monday in October; and at Salina on the second Monday in May; but no cause, action, or proceeding shall be tried or considered at any term held at Salina unless by consent of all the parties thereto, or by order of the court for cause. Terms of the district court for the second division shall be held at Wichita on the second Mondays in March and September; and for the third division, at Fort Scott on the first Monday in May and the second Monday in November. The clerk of the district court shall appoint two deputies, one of whom shall reside and keep his office at Fort Scott, and the other at Wichita; and the marshal shall appoint a deputy who shall reside and keep his office at Fort Scott.

Sec. 83. The State of Kentucky is divided into two districts, to be known as the eastern and western districts of Kentucky. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Carroll, Trimble, Henry, Shelby, Anderson, Mercer, Boyle, Gallatin, Boone, Kenton, Campbell, Pendleton, Grant, Owen, Franklin, Bourbon, Scott, Woodford, Fayette, Jessamine, Garrard, Madison, Lincoln, Rockcastle, Pulaski, Wayne, Whitley, Bell, Knox, Harlan, Laurel, Clay, Leslie, Letcher, Perry, Owsley, Jackson, Estill, Lee, Breathitt, Knott, Pike, Floyd, Magoffin, Martin, Johnson, Lawrence, Boyd, Greenup, Carter, Elliott, Morgan, Wolfe, Powell, Menifee, Clark, Montgomery, Bath, Rowan, Lewis, Fleming, Mason, Bracken, Robertson, Nicholas, and Harrison, with the waters thereof. Terms of the district court for the eastern district shall be held at Frankfort on the second Monday in March and the fourth Monday in September; at Covington on the first Monday in April and the third Monday in October; at Richmond on the fourth Monday in April and the second Monday in November; at London on the second Monday in May and the fourth Monday in November; at Catlettsburg on the fourth Monday in May and the second Monday in December; and at Jackson on the first Monday in March and the third Monday in September: *Provided*, That suitable rooms and accommodations are furnished for holding court at Jackson free of expense to the Government until such time as a public building shall be erected there. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Oldham, Jefferson, Spencer, Bullitt, Nelson, Washington, Marion, Larue, Taylor, Casey, Green, Adair, Russell, Clinton, Cumberland, Monroe, Metcalfe, Allen, Barren, Simpson, Logan, Warren, Butler, Hart, Edmonson, Grayson, Hardin, Meade, Breckinridge, Hancock, Daviess, Ohio, McLean, Muhlenberg, Todd,

Christian, Trigg, Lyon, Caldwell, Livingston, Crittenden, Hopkins, Webster, Henderson, Union, Marshall, Calloway, McCracken, Graves, Ballard, Carlisle, Hickman, and Fulton, with the waters thereof. Terms of the district court for the western district shall be held at Louisville on the second Mondays in March and October; at Owensboro on the first Monday in May and the fourth Monday in November; at Paducah on the third Mondays in April and November; and at Bowling Green on the third Monday in May and the second Monday in December. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Frankfort, at Covington, at Richmond, at London, at Catlettsburg, and at Jackson; and the clerk for the western district shall maintain an office in charge of himself or a deputy at Louisville, at Owensboro, at Paducah, and at Bowling Green, each of which offices shall be kept open at all times for the transaction of the business of said court. The clerks of the courts for the eastern and western districts, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest to a court, and shall, immediately upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause, have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought.

Sec. 84. The State of Louisiana is divided into two judicial districts, to be known as the eastern and western districts of Louisiana. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Assumption, Iberia, Jefferson, Lafourche, Orleans, Plaquemines, Saint Bernard, Saint Charles, Saint James, Saint John the Baptist, Saint Mary, Saint Tammany, Tangipahoa, Terrebonne, and Washington, which shall constitute the New Orleans division; also the territory embraced on the date last mentioned in the parishes of Ascension, East Baton Rouge, East Feliciana, Livingston, Pointe Coupee, Saint Helena, West Baton Rouge, Iberville, and West Feliciana, which shall constitute the Baton Rouge division of said district. Terms of the district court for the New Orleans division shall be held at New Orleans on the third Mondays in February, May, and November; and for the Baton Rouge division, at Baton Rouge on the second Mondays in April and November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at New Orleans and at Baton Rouge which shall be kept open at all times for the transaction of the business of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the parishes of Saint Landry, Evangeline, Saint Martin, Lafayette, and Vermilion, which shall constitute the Opelousas division of said district; also the territory embraced on the date last mentioned in the parishes of Rapides, Avoyelles, Catahoula, La Salle, Grant, and Winn, which shall constitute the Alexandria division of said district; also the territory

embraced on the said date last mentioned in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Sabine, and Red River, which shall constitute the Shreveport division of said district; also the territory embraced on the date last mentioned in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln, which shall constitute the Monroe division of said district; also the territory embraced on the date last mentioned in the parishes of Acadia, Calcasieu, Cameron, and Vernon, which shall constitute the Lake Charles division of said district. Terms of the district court for the Opelousas division shall be held at Opelousas on the first Mondays in January and June; for the Alexandria division, at Alexandria on the fourth Mondays in January and June; for the Shreveport division, at Shreveport on the third Mondays in February and October; for the Monroe division, at Monroe on the first Mondays in April and October; and for the Lake Charles division, at Lake Charles on the third Mondays in May and December. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Opelousas, at Alexandria, at Shreveport, at Monroe, and at Lake Charles, which shall be kept open at all times for the transaction of the business of the court.

Sec. 85. The State of Maine shall constitute one judicial district, to be known as the district of Maine. Terms of the district court shall be held at Portland on the first Tuesdays in February and December; at Bangor on the first Tuesday in June; and at Bath on the first Tuesday in September.

Sec. 86. The State of Maryland shall constitute one judicial district, to be known as the district of Maryland. Terms of the district court shall be held at Baltimore on the first Tuesdays in March, June, September, and December; and at Cumberland on the second Monday in May and the last Monday in September. The clerk of the court shall appoint a deputy who shall reside and maintain an office at Cumberland, unless the clerk shall himself reside there; and the marshal shall also appoint a deputy, who shall reside and maintain an office at Cumberland, unless he shall himself reside there.

Sec. 87. The State of Massachusetts shall constitute one judicial district, to be known as the district of Massachusetts. Terms of the district court shall be held at Boston on the third Tuesday in March, the fourth Tuesday in June, the second Tuesday in September, and the first Tuesday in December; and at Springfield, on the second Tuesdays in May and December: *Provided*, That suitable rooms and accommodations for holding court at Springfield shall be furnished free of expense to the Government until such time as a Federal building shall be erected there for that purpose. The marshal and the clerk for said district shall each appoint at least one deputy, to reside in Springfield and to maintain an office at that place.

Sec. 88. The State of Michigan is divided into two judicial districts, to be known as the eastern and western districts of Michigan. The eastern district shall include the territory embraced on the first day



of July, nineteen hundred and ten, in the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Genesee, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, Shiawassee, and Tuscola, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Branch, Calhoun, Clinton, Hillsdale, Ingham, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, St. Clair, Sanilac, Washtenaw, and Wayne, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Detroit on the first Tuesdays in March, June, and November; for the northern division, at Bay City on the first Tuesdays in May and October, and at Port Huron in the discretion of the judge of said court and at such times as he shall appoint therefor. There shall also be held a special or adjourned term of the district court at Bay City for the hearing of admiralty causes, beginning in the month of February in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft, which shall constitute the northern division; also the territory embraced on the said date last mentioned in the counties of Allegan, Antrim, Barry, Benzie, Berrien, Cass, Charlevoix, Eaton, Emmett, Grand Traverse, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Marquette, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, St. Joseph, Van Buren, and Wexford, which shall constitute the southern division of said district. Terms of the district court for the southern division shall be held at Grand Rapids on the first Tuesdays in March and October; and for the northern division, at Marquette on the first Tuesdays in May and September. All issues of fact shall be tried at the terms held in the division where such suit shall be commenced. Actions in rem and admiralty may be brought in whichever division of the eastern district service can be had upon the res. Nothing herein contained shall prevent the district court of the western division from regulating, by general rule, the venue of transitory actions either at law or in equity, or from changing the same for cause. The clerk of the court for the western district shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said court held at Marquette, who shall reside and keep his office at that place. The marshal for said western district shall keep an office and a deputy marshal at Marquette. The clerk of the court for the eastern district shall keep his office at the city of Detroit, and shall appoint a deputy for the court held at Bay City, who shall reside and keep his office at that place. The marshal for said eastern district shall keep an office and a deputy marshal at Bay City, and mileage on service of process in said northern division shall be computed from Bay City.

Sec. 89. The State of Minnesota shall constitute one judicial district, to be known as the district of Minnesota. It is divided into six divisions, to be known as the first, second, third, fourth, fifth and sixth divi-

sions. The first division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Winona, Wabasha, Olmsted, Dodge, Steele, Mower, Fillmore, and Houston. The second division shall include the territory embraced on the date last mentioned in the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Lesueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac qui Parle. The third division shall include the territory embraced on the date last mentioned in the counties of Chisago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott. The fourth division shall include the territory embraced on the date last mentioned in the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti. The fifth division shall include the territory embraced on the date last mentioned in the counties of Cook, Lake, Saint Louis, Itasca, Koochiching, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton. The sixth division shall include the territory embraced on the date last mentioned in the counties of Stearns, Pope, Stevens, Bigstone, Traverse, Grant, Douglas, Todd, Ottertail, Roseau, Wilkin, Clay, Becker, Wadena, Norman, Polk, Red Lake, Marshall, Kittson, Beltrami, Clearwater, Mahnomen, and Hubbard. Terms of the district court for the first division shall be held at Winona on the third Tuesdays in May and November; for the second division, at Mankato on the fourth Tuesdays in April and October; for the third division, at Saint Paul on the first Tuesdays in June and December; for the fourth division, at Minneapolis on the first Tuesdays in April and October; for the fifth division, at Duluth on the second Tuesdays in January and July; and for the sixth division, at Fergus Falls on the first Tuesday in May and second Tuesday in November. The clerk of the court shall appoint a deputy clerk at each place where the court is now required to be held at which the clerk shall not himself reside, who shall keep his office and reside at the place appointed for the holding of said court.

Sec. 90. The State of Mississippi is divided into two judicial districts, to be known as the northern and southern districts of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Coahoma, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster, and Yalobusha, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December, and at Clarksdale on the third Mondays in June and December: *Provided*, That suitable rooms and accommodations for holding court at Clarksdale are furnished free of expense to the

United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned in the counties of Bolivar, Claiborne, Issaquena, Sharkey, Sunflower, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which constitutes the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held, at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district.

Sec. 91. The State of Missouri is divided into two judicial districts, to be known as the eastern and western districts of Missouri. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the city of Saint Louis and the counties of Audrain, Crawford, Dent, Franklin, Gasconade, Iron, Jefferson, Lincoln, Maries, Montgomery, Phelps, Saint Charles, Saint Francois, Sainte Genevieve, Saint Louis, Warren, and Washington, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Chariton, Clark, Knox, Lewis, Linn, Macon, Marion, Monroe, Pike, Ralls, Randolph, Schuyler, Scotland, and Shelby, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Bollinger, Butler, Cape Girardeau, Carter, Dunklin, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, Scott, Shannon, Stoddard, and Wayne, which shall constitute the southeastern division of said district. Terms of the district court for the eastern division shall be held at Saint Louis on the first Mondays in May and November, and at Rolla on the second Mondays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Rolla are furnished free of expense to the United States; for the northern division, at Hannibal on the fourth Monday in May and the first Monday in December; and for the southeastern division, at Cape Girardeau on

the second Mondays in April and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bates, Caldwell, Carroll, Cass, Clay, Grundy, Henry, Jackson, Johnson, Lafayette, Livingston, Mercer, Putnam, Ray, Saint Clair, Saline, and Sullivan, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Barton, Barry, Jasper, Lawrence, McDonald, Newton, Stone, and Vernon, which shall constitute the southwestern division; also the territory embraced on the date last mentioned in the counties of Andrew, Atchison, Buchanan, Clinton, Daviess, Dekalb, Gentry, Holt, Harrison, Nodaway, Platte, and Worth, which shall constitute the Saint Joseph division; also the territory embraced on the date last mentioned in the counties of Benton, Boone, Callaway, Cooper, Camden, Cole, Hickory, Howard, Miller, Moniteau, Morgan, Osage, and Pettis, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Christian, Cedar, Dade, Dallas, Douglas, Greene, Howell, Laclede, Oregon, Ozark, Polk, Pulaski, Taney, Texas, Webster, and Wright, which constitutes the southern division. Terms of the district court for the western division shall be held at Kansas City on the fourth Monday in April and first Monday in November, and at Chillicothe on the fourth Monday in May and the first Monday in December: *Provided*, That suitable rooms and accommodations for holding court at Chillicothe are furnished free of expense to the United States; for the southwestern division, at Joplin on the second Mondays in June and January; for the Saint Joseph division, at Saint Joseph on the first Monday in March and third Monday in September; for the central division, at Jefferson City on the third Mondays in March and October; and for the southern division, at Springfield on the first Mondays in April and October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Kansas City, at Jefferson City, at Saint Joseph, at Chillicothe, at Joplin, and at Springfield, which shall be kept open at all times for the transaction of the business of the court. The marshal for each district shall also maintain an office in charge of himself or a deputy at each place at which court is now held in his district.

Sec. 92. The State of Montana shall constitute one judicial district, to be known as the district of Montana. Terms of the district court shall be held at Helena on the first Mondays in April and November; at Butte on the first Tuesdays in February and September; at Great Falls on the first Mondays in May and October; at Missoula on the first Mondays in January and June; and at Billings on the first Mondays in March and August. Causes, civil and criminal, may be transferred by the court or judge thereof from Helena to Butte or from Butte to Helena, or from Helena or Butte to Great Falls, or from Great Falls to Helena or Butte, in said district, when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in either place.

Sec. 93. The State of Nebraska shall constitute one judicial district, to be known as the district of Nebraska. Said district is divided into eight divisions. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Douglas, Sarpy, Washington, Dodge, Colfax, Platte, Nance, Boone, Wheeler, Burt, Thurston, Dakota, Cuming, Cedar, and Dixon, shall constitute the Omaha division; the territory embraced on the date last mentioned in the counties of Madison, Antelope, Knox, Pierce, Stanton, Wayne, Holt, Boyd, Rock, Brown, and Keya Paha, shall constitute the Norfolk division; the territory embraced on the date last mentioned in the counties of Cherry, Sheridan, Dawes, Box Butte, and Sioux, shall constitute the Chadron division; the territory embraced on the date last mentioned in the counties of Hall, Merrick, Howard, Greeley, Garfield, Valley, Sherman, Buffalo, Custer, Loup, Blaine, Thomas, Hooker, and Grant, shall constitute the Grand Island division; the territory embraced on the date last mentioned in the counties of Lincoln, Dawson, Logan, McPherson, Keith, Deuel, Garden, Morrill, Cheyenne, Kimball, Banner, and Scott's Bluff, shall constitute the North Platte division; the territory embraced on the date last mentioned in the counties of Cass, Otoe, Johnson, Nemaha, Pawnee, Richardson, Gage, Lancaster, Saunders, Butler, Seward, Saline, Jefferson, Thayer, Fillmore, York, Polk, and Hamilton, shall constitute the Lincoln division; the territory embraced on the date last mentioned in the counties of Clay, Nuckolls, Webster, Adams, Kearney, Franklin, Harlan, and Phelps, shall constitute the Hastings division; and the territory embraced on the date last mentioned in the counties of Gosper, Furnas, Red Willow, Frontier, Hayes, Hitchcock, Dundy, Chase, and Perkins, shall constitute the McCook division. Terms of the district court for the Omaha division shall be held at Omaha on the first Monday in April and the fourth Monday in September; for the Norfolk division, at Norfolk on the third Monday in September; for the Chadron division, at Chadron on the second Monday in September; for the Grand Island division, at Grand Island on the second Monday in January; for the North Platte division, at North Platte on the second Monday in June; for the Lincoln division, at Lincoln on the second Monday in May and the first Monday in October; for the Hastings division, at Hastings on the second Monday in March; and for the McCook division, at McCook on the first Monday in March: *Provided*, That where provision is made herein for holding court at places where there are no Federal buildings, a suitable room in which to hold court, together with light and heat, shall be provided by the city or county where such court is held, without any expense to the United States. The clerk of the court shall appoint a deputy for each division of the district in which he does not himself reside, who shall keep his office and reside at the place of holding court in the division for which he is appointed.

Sec. 94. The State of Nevada shall constitute one judicial district, to be known as the district of Nevada. Terms of the district court shall be held at Carson City on the first Mondays in February, May, and October.

Sec. 95. The State of New Hampshire shall constitute one judicial

district, to be known as the district of New Hampshire. Terms of the district court shall be held at Portsmouth on the third Tuesdays in March and September; at Concord on the third Tuesdays in June and December; and at Littleton on the last Tuesday in August.

Sec. 96. The State of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Trenton on the third Tuesdays in January, April, June, and September. At each term of the district court it shall be lawful for the judge holding such term, on consent of both parties, or on application therefor and good cause shown by either party to any civil cause set for trial or hearing at said term, to order such cause to be held or tried at the city of Newark, in said district, upon the day set for that purpose by said judge: *Provided*, That such application shall be made to said judge, either in vacation or term time, at least one week before the date set for trial of said cause, and on at least five days' notice to the opposite party or his or her attorney; and writs of subpoena to compel the attendance of witnesses at said city of Newark may issue, and jurors summoned to attend said term may be ordered by said judge to be in attendance upon said court in the city of Newark.

Sec. 97. The State of New York is divided into four judicial districts, to be known as the northern, eastern, southern, and western districts of New York. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties

of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions and for proceedings in bankruptcy and the trial of causes in admiralty, shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge.

Sec. 98. The State of North Carolina is divided into two districts, to be known as the eastern and western districts of North Carolina. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October: *Provided*, That the city of Washington shall provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, and at Washington, which shall be kept open at all times for the transaction of the business

of the court. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the western district shall be held at Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court.

Sec. 99. The State of North Dakota shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, and Sheridan, and all the territory in said State lying west of the Missouri River and south of the twelfth standard parallel, shall constitute the southwestern division of said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs, and Steele, shall constitute the southeastern division; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, shall constitute the northeastern division; and the territory embraced on the date last mentioned in the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry, shall constitute the northwestern division; and the territory embraced on the date last mentioned in the counties of Ward, Williams, and Mont-raille, and all the territory in said State lying west of the Missouri River, and north of the twelfth standard parallel, shall constitute the western division. The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the southwestern division shall be held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo on the third Tuesday in May; for the northeastern division, at Grand Forks on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; and for the western division, at Minot on the second Tuesday in October. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district.

Sec. 100. The State of Ohio is divided into two judicial districts,



to be known as the northern and southern districts of Ohio. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Ashland, Ashtabula, Cuyahoga, Carroll, Columbiana, Crawford, Geauga, Holmes, Lake, Lorain, Medina, Mahoning, Portage, Richland, Summit, Stark, Tuscarawas, Trumbull, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Auglaize, Allen, Defiance, Erie, Fulton, Henry, Hancock, Hardin, Huron, Lucas, Mercer, Marion, Ottawa, Paulding, Putnam, Seneca, Sandusky, Van Wert, Williams, Wood, and Wyandotte, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Cleveland on the first Tuesdays in February, April, and October, and at Youngstown on the first Tuesday after the first Monday in March; and for the western division, at Toledo on the last Tuesdays in April and October. Grand and petit jurors summoned for service at a term of court to be held at Cleveland may, if in the opinion of the court the public convenience so requires, be directed to serve also at the term then being held or authorized to be held at Youngstown. Crimes and offenses committed in the eastern division shall be cognizable at the terms held at Cleveland; or at Youngstown, as the court may direct. Any suit brought in the eastern division may, in the discretion of the court, be tried at the term held at Youngstown. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Lawrence, Miami, Montgomery, Preble, Scioto, Shelby, and Warren, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Athens, Belmont, Coshocton, Delaware, Fairfield, Fayette, Franklin, Gallia, Guernsey, Harrison, Hocking, Jackson, Jefferson, Knox, Licking, Logan, Madison, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Pickaway, Pike, Ross, Union, Vinton, and Washington, which shall constitute the eastern division of said district. Terms of the district court for the western division shall be held at Cincinnati on the first Tuesdays in February, April, and October; and for the eastern division, at Columbus on the first Tuesdays in June and December: *Provided*, That terms of the district court for the southern district shall be held at Dayton on the first Mondays in May and November. Prosecutions for crimes and offenses committed in any part of said district shall also be cognizable at the terms held at Dayton. All suits which may be brought within the southern district, or either division thereof, may be instituted, tried, and determined at the terms held at Dayton.

Sec. 101. The State of Oklahoma is divided into two judicial districts, to be known as the eastern and the western districts of Oklahoma. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adair, Atoka, Bryan, Craig, Cherokee, Creek, Choctaw, Coal, Carter, Delaware, Garvin, Grady, Haskell, Hughes, Johnston, Jefferson, Latimer, Le Flore, Love, McClain,

Mayes, Muskogee, McIntosh, McCurtain, Murray, Marshall, Nowata, Ottawa, Okmulgee, Ofuskee, Pittsburg, Pushmataha, Pontotoc, Rogers, Stephens, Sequoyah, Seminole, Tulsa, Washington, and Wagoner. Terms of the district court for the eastern district shall be held at Muskogee on the first Monday in January; at Vinita on the first Monday in March; at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; and at Chickasha on the first Monday in November in each year. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Majors, Noble, Oklahoma, Osage, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods, and Woodward. Terms of the district court for the western district shall be held at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June; at Lawton on the first Monday in September; and at Woodward on the first Monday in November: *Provided*, That suitable rooms and accommodations for holding court at Woodward are furnished free of expense to the United States. The clerk of the district court for the eastern district shall keep his office at Muskogee, and the clerk for the western district at Guthrie, and shall maintain an office in charge of himself or a deputy at Oklahoma City.

Sec. 102. The State of Oregon shall constitute one judicial district, to be known as the district of Oregon. Terms of the district court shall be held at Portland on the first Mondays in March, July, and November; at Pendleton on the first Tuesday in April; and at Medford on the first Tuesday in October. The marshal and the clerk for said district shall each appoint, in the manner provided by law, at least one deputy at Pendleton and one at Medford, who shall reside and maintain an office at each of said places.

Sec. 103. The State of Pennsylvania is divided into three judicial districts, to be known as the eastern, middle, and western districts of Pennsylvania. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December. each term to continue until the succeeding term begins. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the fourth Monday in February and

the third Monday in October; at Harrisburg on the first Mondays in May and December; and at Williamsport on the second Mondays in January and June. The clerk of the court for the middle district shall maintain an office in charge of himself or a deputy at Harrisburg; and civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburg on the first Monday in May and the third Monday in October; and at Erie on the third Monday in July and the second Monday in January.

Sec. 104. The State of Rhode Island shall constitute one judicial district, to be known as the district of Rhode Island. Terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November; and at Newport on the second Tuesday in May and the third Tuesday in October.

Sec. 105. The State of South Carolina is divided into two districts, to be known as the eastern and western districts of South Carolina. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the district court for the western district shall be held at Greenville on the third Tuesdays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville, and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other.

Sec. 106. The State of South Dakota shall constitute one judicial district, to be known as the district of South Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aurora, Beadle, Bon Homme, Brookings, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, Lincoln, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton, and in the Yankton Indian reservation, shall constitute the

southern division of said district; the territory embraced on the date last mentioned in the counties of Brown, Campbell, Clark, Codington, Corson, Day, Deuel, Edmunds, Grant, Hamlin, McPherson, Marshall, Roberts, Schnasse, Spink, and Walworth, and in the Sisseton and Wahpeton Indian reservation, and in that portion of the Standing Rock Indian reservation lying in South Dakota, shall constitute the northern division; the territory embraced on the date last mentioned in the counties of Armstrong, Buffalo, Dewey, Faulk, Hand, Hughes, Hyde, Jerauld, Lyman, Potter, Stanley, and Sully, and in the Cheyenne River, Lower Brule, and Crow Creek Indian reservations, shall constitute the central division; and the territory embraced on the date last mentioned in the counties of Bennett, Butte, Custer, Fall River, Harding, Lawrence, Meade, Mellette, Pennington, Perkins, Shannon, Todd, Tripp, Washabaugh, and Washington, and in the Rosebud and Pine Ridge Indian reservations, shall constitute the western division. Terms of the district court for the southern division shall be held at Sioux Falls on the first Tuesday in April and the third Tuesday in October; for the northern division, at Aberdeen on the first Tuesday in May and the second Tuesday in November; for the central division, at Pierre on the second Tuesday in June and the first Tuesday in October; and for the western division, at Deadwood on the third Tuesday in May and the first Tuesday in September. The clerk of the district court shall maintain an office in charge of himself or a deputy at Sioux Falls, at Pierre, at Aberdeen, and at Deadwood, which shall be kept open for the transaction of the business of the court.

Sec. 107. The State of Tennessee is divided into three districts, to be known as the eastern, middle, and western districts of Tennessee. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the northeastern division of said district. Terms of the district court for the southern division of said district shall be held at Chattanooga on the fourth Mondays in May and November; for the northern division at Knoxville on the first Mondays in January and July; and for the northeastern division, at Greeneville on the last Mondays in March and September. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the Nashville division of said district; also the territory embraced on the date last

mentioned in the counties of Clay, Cumberland, DeKalb, Fentress, Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the northeastern division of said district. Terms of the district court for the Nashville division of said district shall be held at Nashville on the second Mondays in April and October; and for the northeastern division, at Cookeville on the second Mondays in May and November: *Provided*, That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the west bank of the river, which shall constitute the eastern division of said district. Terms of the district court for the western division of said district shall be held at Memphis on the fourth Mondays in May and November; and for the eastern division, at Jackson on the fourth Mondays in April and October. The clerk of the court for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the western district shall appoint a deputy who shall reside at Jackson. The marshal for the eastern district shall appoint a deputy who shall reside at Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greeneville, which shall be kept open at all times for the transaction of the business of the court.

Sec. 108. The State of Texas is divided into four districts, to be known as the northern, eastern, western, and southern districts of Texas. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dallas, Ellis, Hunt, Johnson, Kaufman, Navarro, and Rockwall, which shall constitute the Dallas division; also the territory embraced on the date last mentioned in the counties of Archer, Baylor, Clay, Comanche, Erath, Foard, Hardeman, Hood, Jack, Palo Pinto, Parker, Tarrant, Wichita, Wilbarger, Wise, and Young, which shall constitute the Fort Worth division; also the territory embraced on the date last mentioned in the counties of Armstrong, Bailey, Briscoe, Carson, Castro, Childress, Cochran, Collingsworth, Cottle, Crosby, Dallam, Deaf Smith, Dickens, Donley, Floyd, Gray, Hale, Hall, Hansford, Hartley, Hemphill, Hockley, Hutchinson, King, Lamb, Lipscomb, Lubbock, Moore, Motley, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher, and Wheeler, which shall constitute the Amarillo division; also the territory embraced on the date last men-

tioned in the counties of Andrews, Borden, Callahan, Dawson, Eastland, Fisher, Gaines, Garza, Haskell, Howard, Jones, Kent, Knox, Lynn, Martin, Midland, Mitchell, Nolan, Scurry, Shackelford, Stephens, Stonewall, Taylor, Terry, Throckmorton, and Yoakum, which shall constitute the Abilene division; also the territory embraced on the date last mentioned in the counties of Brown, Coke, Coleman, Concho, Crockett, Glasscock, Irion, Menard, Mills, Runnels, Schleicher, Sterling, Sutton, Tom Green, and Upton, which shall constitute the San Angelo division of the said district. Terms of the district court for the Dallas division shall be held at Dallas on the second Monday in January and the first Monday in May; for the Fort Worth division, at Fort Worth on the first Monday in November and the second Monday in March; for the Amarillo division, at Amarillo on the third Monday in April and the fourth Monday in September; for the Abilene division at Abilene on the first Monday in October and the second Monday in April; and for the San Angelo division, at San Angelo on the third Monday in October and the fourth Monday in April. The clerk of the court for the northern district shall maintain an office in charge of himself or a deputy at Dallas, at Fort Worth, at Amarillo, at Abilene, and at San Angelo, which shall be kept open at all times for the transaction of the business of the court. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Anderson, Angelina, Cherokee, Gregg, Henderson, Houston, Nacogdoches, Panola, Rains, Rusk, Smith, Van Zandt, and Wood, which shall constitute the Tyler division; also the territory embraced on the date last mentioned in the counties of Hardin, Jasper, Jefferson, Liberty, Newton, Orange, Sabine, San Augustine, Shelby, and Tyler, which shall constitute the Beaumont division; also the territory embraced on the date last mentioned in the counties of Collin, Cook, Denton, Grayson, and Montague, which shall constitute the Sherman division; also the territory embraced on the date last mentioned in the counties of Camp, Cass, Harrison, Hopkins, Marion, Morris, and Upshur, which shall constitute the Jefferson division; also the territory embraced on the date last mentioned in the counties of Delta, Fannin, Red River, and Lamar, which shall constitute the Paris division; also the territory embraced on the date last mentioned in the counties of Bowie, Franklin, and Titus, which shall constitute the Texarkana division. Terms of the district court for the Tyler division shall be held at Tyler on the fourth Mondays in January and April; for the Jefferson division, at Jefferson on the first Monday in October and the third Monday in February; for the Beaumont division, at Beaumont on the third Monday in November and the first Monday in April; for the Sherman division, at Sherman on the first Monday in January and the third Monday in May; for the Paris division, at Paris on the third Monday in October and the first Monday in March; and for the Texarkana division at Texarkana on the third Monday in March and the first Monday in November. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Sherman, at Beaumont, and at Texarkana, which shall be kept open at all times for the transaction of the business of said court. The west-

ern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bastrop, Blanco, Burleson, Burnet, Caldwell, Gillespie, Hays, Kimble, Lampasas, Lee, Llano, Mason, McCulloch, San Saba, Travis, Washington, and Williamson, which shall constitute the Austin division; also the territory embraced on the date last mentioned in the counties of Atascosa, Bandera, Bexar, Comal, Dimmit, Edwards, Frio, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Medina, and Wilson, which shall constitute the San Antonio division; also the territory embraced on the date last mentioned in the counties of Brewster, Crane, Ector, El Paso, Jeff Davis, Loving, Reeves, Presidio, Ward, and Winkler, which shall constitute the El Paso division; also the territory embraced on the date last mentioned in the counties of Bell, Bosque, Coryell, Falls, Hamilton, Freestone, Hill, Leon, Limestone, McLennan, Milam, Robertson, and Somervell, which shall constitute the Waco division; also the territory embraced on the date last mentioned in the counties of Kinney, Maverick, Pecos, Terrell, Uvalde, Valverde, and Zavalla, which shall constitute the Del Rio division. Terms of the district court for the Austin division shall be held at Austin on the fourth Monday in January and the second Monday in June; for the Waco division, at Waco on the fourth Monday in February and the second Monday in November; for the San Antonio division, at San Antonio on the first Monday in May and the third Monday in December; for the El Paso division, at El Paso on the first Monday in April and the first Monday in October; and for the Del Rio division, at Del Rio on the third Monday in March and the fourth Monday in October. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Austin, at El Paso, and at Del Rio, which shall be kept open at all times for the transaction of business. The southern district shall include the territory embraced on the first of July, nineteen hundred and ten, in the counties of Duval, La Salle, McMullen, Nueces, Webb, and Zapata, which shall constitute the Laredo division; also the territory embraced on the date last mentioned in the counties of Cameron, Hidalgo, and Starr, which shall constitute the Brownsville division; also the territory embraced on the date last mentioned in the counties of Austin, Brazoria, Chambers, Galveston, Fort Bend, Matagorda, and Wharton, which shall constitute the Galveston division; also the territory embraced on the date last mentioned, in the counties of Brazos, Colorado, Fayette, Grimes, Harris, Lavaca, Madison, Montgomery, Polk, San Jacinto, Trinity, Walker, and Waller, which shall constitute the Houston division; also the territory embraced on the date last mentioned, in the counties of Bee, Calhoun, Dewitt, Goliad, Jackson, Live Oak, Refugio, Aransas, San Patricio, and Victoria, which shall constitute the Victoria division. Terms of the district court for the Galveston division shall be held at Galveston on the second Monday in January and the first Monday in June; for the Houston division, at Houston on the fourth Mondays in February and September; for the Laredo division, at Laredo on the third Monday in April and the second Monday in November; for the Brownsville division, at Brownsville on the second Monday in May and the first Monday in Decem-

ber; and for the Victoria division, at Victoria on the first Monday in May and the fourth Monday in November. The clerk of the court for the southern district shall maintain an office in charge of himself or a deputy at each of the places now designated for holding court in said district.

Sec. 109. The State of Utah shall constitute one judicial district, to be known as the district of Utah. It is divided into two divisions, to be known as the northern and central divisions. The northern division shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Boxelder, Cache, Davis, Morgan, Rich, and Weber. The central division shall include the territory embraced on the date last mentioned in the counties of Beaver, Carbon, Emery, Garfield, Grand, Iron, Juab, Kane, Millard, Piute, Salt Lake, San Juan, San Pete, Sevier, Summit, Tooele, Uinta, Utah, Wasatch, Washington, and Wayne. Terms of the district court for the northern division shall be held at Ogden on the second Mondays in March and September; and for the central division, at Salt Lake City on the second Mondays in April and November. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at each of the places where the court is now required to be held in the district.

Sec. 110. The State of Vermont shall constitute one judicial district, to be known as the district of Vermont. Terms of the district court shall be held at Burlington on the fourth Tuesday in February; at Windsor on the third Tuesday in May; and at Rutland on the first Tuesday in October. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier, and one at Newport.

Sec. 111. The State of Virginia is divided into two districts, to be known as the eastern and western districts of Virginia. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Accomac, Alexandria, Amelia, Brunswick, Caroline, Charles City, Chesterfield, Culpeper, Dinwiddie, Elizabeth City, Essex, Fairfax, Fauquier, Gloucester, Goochland, Greensville, Hanover, Henrico, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenburg, Mathews, Mecklenburg, Middlesex, Nansemond, New Kent, Norfolk, Northampton, Northumberland, Nottoway, Orange, Powhatan, Prince Edward, Prince George, Prince William, Princess Anne, Richmond, Southampton, Spottsylvania, Stafford, Surry, Sussex, Warwick, Westmoreland, and York. Terms of the district court shall be held at Richmond on the first Mondays in April and October; at Norfolk on the first Mondays in May and November; and at Alexandria on the first Mondays in January and July. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alleghany, Albemarle, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Dickenson, Floyd, Fluvanna, Franklin, Frederick, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Page, Patrick, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Shenandoah, Smyth, Tazewell, Warren, Wash-



ington, Wise, and Wythe. Terms of the district court shall be held at Lynchburg on the Tuesdays after the second Mondays in March and September; at Danville on the Tuesdays after the second Mondays in April and November; at Abingdon on the Tuesdays after the first Mondays in May and October; at Harrisonburg on the Tuesdays after the first Mondays in June and December; at Charlottesville on the second Monday in January and the first Monday in July; at Roanoke on the third Monday in February and the third Monday in June; and at Big Stone Gap on the fourth Monday in January and the second Monday in August. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Lynchburg, at Danville, at Charlottesville, at Roanoke, Abingdon, and at Big Stone Gap, which shall be kept open at all times for the transaction of the business of the court.

Sec. 112. The State of Washington is divided into two districts, to be known as the eastern and western districts of Washington. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Spokane, Stevens, Ferry, Okanogan, Chelan, Grant, Douglas, Lincoln, and Adams, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Asotin, Garfield, Whitman, Columbia, Franklin, Walla Walla, Benton, Klickitat, Kittitas, and Yakima, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Spokane on the first Tuesdays in April and September; for the southern division, at Walla Walla on the first Tuesdays in June and December, and at North Yakima on the first Tuesdays in May and October. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Whatcom, Skagit, Snohomish, King, San Juan, Island, Kitsap, Clallam, and Jefferson, with the waters thereof, including all Indian reservations within said counties, which shall constitute the northern division; also the territory embraced on the date last mentioned in the counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, with the waters thereof, including all Indian reservations within said counties, which shall constitute the southern division of said district. Terms of the district court for the northern division shall be held at Bellingham on the first Tuesdays in April and October; at Seattle on the first Tuesdays in May and November; and for the southern division, at Tacoma on the first Tuesdays in February and July. The clerks of the courts for the eastern and western districts shall maintain an office in charge of himself or a deputy at each place in their respective districts where terms of court are now required to be held.

Sec. 113. The State of West Virginia is divided into two districts, to be known as the northern and southern districts of West Virginia. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke,

Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof. Terms of the district court for the northern district shall be held at Martinsburg, the first Tuesday of April and the third Tuesday of September; at Clarksburg, the second Tuesday of April and the first Tuesday of October; at Wheeling the first Tuesday of May and the third Tuesday of October; at Philippi, the fourth Tuesday of May and the first Tuesday of November; at Parkersburg, the second Tuesday of January and the second Tuesday of June: *Provided*, That a place for holding court at Philippi shall be furnished the Government free of cost by Barbour County until other provision is made therefor by law. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton, Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday in June and the third Tuesday in November; at Huntington, on the first Tuesday in April and the first Tuesday after the third Monday in September; at Bluefield on the first Tuesday in May and the third Tuesday in October; at Addison on the first Monday in September; and at Lewisburg on the second Tuesday in February: *Provided*, That accommodations for holding court at Addison shall be furnished without cost to the United States.

Sec. 114. The State of Wisconsin is divided into two districts, to be known as the eastern and western districts of Wisconsin. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Brown, Calumet, Dodge, Door, Florence, Fond du Lac, Forest, Green Lake, Kenosha, Kewaunee, Langlade, Manitowoc, Marinette, Marquette, Milwaukee, Oconto, Outagamie, Ozaukee, Racine, Shawano, Sheboygan, Walworth, Washington, Waukesha, Waupaca, Waushara, and Winnebago. Terms of the district court for said district shall be held at Milwaukee on the first Mondays in January and October; at Oshkosh on the second Tuesday in June; and at Green Bay on the first Tuesday in April. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Columbia, Crawford, Dane, Dunn, Douglas, Eau Claire, Grant, Green, Iowa, Iron, Jackson, Jefferson, Juneau, La Crosse, Lafayette, Lincoln, Marathon, Monroe, Oneida, Pepin, Pierce, Polk, Portage, Price, Richland, Rock, Rusk, Saint Croix, Sauk, Sawyer, Taylor, Trempealeau, Vernon, Vilas, Washburn, and Wood. Terms of the district court for said district shall be held at Madison on the first Tuesday in December; at Eau Claire on the first Tuesday in June; at La Crosse on the third Tuesday in September; and at Superior on the fourth Tuesday in January and the second Tuesday in July. The district court

for each of said districts shall be open at all times for the purpose of hearing and deciding causes of admiralty and maritime jurisdiction, so far as the same can be done without a jury. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Madison, at La Crosse, and at Superior, which shall be kept open at all times for the transaction of the business of the court. The marshal for the western district shall appoint a deputy marshal who shall reside and keep his office at Superior. All writs and other process, except criminal warrants, issued at Superior, may be made returnable at Superior; and the clerk at that place shall keep in his office the original records of all actions, prosecutions, and special proceedings so commenced and pending therein. Criminal warrants may be returned at any place within the district where court is held. Whenever warrants issued at Superior shall be returned at any other place, the clerk of the court wherein the warrant is returned, shall certify the same, under the seal of the court, together with the plea and other proceedings had thereon, and the determination of the court upon such plea or proceedings, with all papers or orders filed in reference thereto, to the clerk of the court at Superior; and the clerk at Superior shall enter upon his records a minute of the proceedings had upon the return of said warrant, certified as aforesaid. All causes and proceedings instituted in the court at Superior, shall be tried therein, unless by consent of the parties, or upon the order of the court, they are transferred to another place for trial.

Sec. 115. The State of Wyoming and the Yellowstone National Park shall constitute one judicial district, to be known as the district of Wyoming. Terms of the district court for said district shall be held at Cheyenne on the second Mondays in May and November; at Evanston on the second Tuesday in July; and at Lander on the first Monday in October; and the said court shall hold one session annually at Sheridan, and in said national park, on such dates as the court may order. The marshal and clerk of the said court shall each, respectively, appoint at least one deputy to reside at Evanston, and one to reside at Lander, unless he himself shall reside there, and shall also maintain an office at each of those places: *Provided*, That until a public building is provided at Lander, suitable accommodations for holding court in said town shall be furnished the Government at an expense not to exceed three hundred dollars annually. The marshal of the United States for the said district may appoint one or more deputy marshals for the Yellowstone National Park, who shall reside in said park.

## CHAPTER SIX.

## CIRCUIT COURTS OF APPEALS.

Sec.	Sec.
116. Circuits.	129. Appeals in proceedings for injunctions and receivers.
117. Circuit courts of appeals.	130. Appellate and supervisory jurisdiction under the bankrupt act.
118. Circuit judges.	131. Appeals from the United States court for China.
119. Allotment of justices to the circuits.	132. Allowance of appeals, etc.
120. Chief justice and associate justices of Supreme Court, and district judges, may sit in circuit court of appeals.	133. Writs of error and appeals from the supreme courts of Arizona and New Mexico.
121. Justices, allotted to circuits, how designated.	134. Writs of error and appeals from district court for Alaska to circuit court of appeals for ninth circuit; court may certify question to the Supreme Court.
122. Seals, forms of process, and rules.	135. Appeals and writs of error from Alaska; where heard.
123. Marshals.	
124. Clerks.	
125. Deputy clerks; appointment and removal.	
126. Terms.	
127. Rooms for court, how provided.	
128. Jurisdiction; when judgment final.	

Sec. 116. There shall be nine judicial circuits of the United States, constituted as follows:

First. The first circuit shall include the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.

Second. The second circuit shall include the districts of Vermont, Connecticut, and New York.

Third. The third circuit shall include the districts of Pennsylvania, New Jersey, and Delaware.

Fourth. The fourth circuit shall include the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

Fifth. The fifth circuit shall include the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.

Sixth. The sixth circuit shall include the districts of Ohio, Michigan, Kentucky, and Tennessee.

Seventh. The seventh circuit shall include the districts of Indiana, Illinois, and Wisconsin.

Eighth. The eighth circuit shall include the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, Arkansas, Colorado, Wyoming, North Dakota, South Dakota, Utah and Oklahoma.

Ninth. The ninth circuit shall include the districts of California, Oregon, Nevada, Washington, Idaho, Montana, and Hawaii.

Sec. 117. There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record, with appellate jurisdiction as hereinafter limited and established.

Sec. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges, in the fourth circuit, two circuit judges, and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year, each, payable monthly. Each circuit judge shall reside within his circuit.

Sec. 119. The Chief Justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a Chief Justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the Chief Justice, and shall be binding until the next term and until a new allotment by the court. Whenever, by reason of death or resignation, no justice is allotted to a circuit, the Chief Justice may, until a justice is regularly allotted thereto, temporarily assign a justice of another circuit to such circuit.

Sec. 120. The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside. In the absence of such Chief Justice, or associate justice, the circuit judges in attendance upon the court shall preside in the order of the seniority of their respective commissions. In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

Sec. 121. The words "circuit justice" and "justice of a circuit," when used in this title, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice.

Sec. 122. Each of said circuit courts of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

Sec. 123. The United States marshals in and for the several districts of said courts shall be the marshals of said circuit courts of appeals, and shall exercise the same powers and perform the same duties, under

the regulations of the court, as are exercised and performed by the marshal of the Supreme Court of the United States, so far as the same may be applicable.

Sec. 124. Each court shall appoint a clerk, who shall exercise the same powers and perform the same duties in regard to all matters within its jurisdiction, as are exercised and performed by the clerk of the Supreme Court, so far as the same may be applicable.

Sec. 125. The clerk of the circuit court of appeals for each circuit may, with the approval of the court, appoint such number of deputy clerks as the court may deem necessary. Such deputies may be removed at the pleasure of the clerk appointing them, with the approval of the court. In case of the death of the clerk his deputy or deputies shall, unless removed by the court, continue in office and perform the duties of the clerk in his name until a clerk is appointed and has qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable, and his executor or administrator shall have such remedy for such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 126. A term shall be held annually by the circuit courts of appeals in the several judicial circuits at the following places, and at such times as may be fixed by said courts, respectively: In the first circuit, in Boston; in the second circuit, in New York; in the third circuit, in Philadelphia; in the fourth circuit, in Richmond; in the fifth circuit, in New Orleans, Atlanta, Fort Worth, and Montgomery; in the sixth circuit, in Cincinnati; in the seventh circuit, in Chicago; in the eighth circuit, in Saint Louis, Denver, or Cheyenne, and Saint Paul; in the ninth circuit, in San Francisco, and each year in two other places in said circuit to be designated by the judges of said court; and in each of the above circuits, terms may be held at such other times and in such other places as said courts, respectively, may from time to time designate: *Provided*, That terms shall be held in Atlanta on the first Monday in October, in Fort Worth on the first Monday in November, in Montgomery on the third Monday in October, in Denver or in Cheyenne on the first Monday in September, and in Saint Paul on the first Monday in May. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the State of Georgia, in the State of Texas, and in the State of Alabama, to the circuit court of appeals for the fifth judicial circuit shall be heard and disposed of, respectively, by said court at the terms held in Atlanta, in Fort Worth, and in Montgomery, except that appeals or writs of error in cases of injunctions and in all other cases which, under the statutes and rules, or in the opinion of the court, are entitled to be brought to a speedy hearing may be heard and disposed of wherever said court may be sitting. All appeals, writs of errors, and other appellate proceedings which may hereafter be taken or prosecuted from the district court of the United

States at Beaumont, Texas, to the circuit court of appeals for the fifth circuit, shall be heard and disposed of by the said circuit court of appeals at the terms of court held at New Orleans: *Provided*, That nothing herein shall prevent the court from hearing appeals or writs of error wherever the said court shall sit, in cases of injunctions and in all other cases which, under the statutes and the rules, or in the opinion of the court, are entitled to be brought to a speedy hearing. All appeals, writs of error, and other appellate proceedings which may be taken or prosecuted from the district courts of the United States in the States of Colorado, Utah, and Wyoming, and the supreme court of the Territory of New Mexico to the circuit court of appeals for the eighth judicial circuit, shall be heard and disposed of by said court at the terms held either in Denver or in Cheyenne, except that any case arising in any of said States or Territory may, by consent of all the parties, be heard and disposed of at a term of said court other than the one held in Denver or Cheyenne.

Sec. 127. The marshals for the several districts in which said circuit courts of appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for the business of said courts, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided*, That in case proper rooms can not be provided in such buildings, then the marshals, with the approval of the Attorney General, may, from time to time, lease such rooms as may be necessary for such courts.

Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States district court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.

Sec. 129. Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the circuit court of appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court: *Provided*, That the appeal

must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court, or the appellate court, or a judge thereof, during the pendency of such appeal: *Provided, however,* That the court below may, in its discretion, require as a condition of the appeal an additional bond.

Sec. 130. The circuit courts of appeals shall have the appellate and supervisory jurisdiction conferred upon them by the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July first, eighteen hundred and ninety-eight, and all laws amendatory thereof, and shall exercise the same in the manner therein prescribed.

Sec. 131. The circuit court of appeals for the ninth circuit is empowered to hear and determine writs of error and appeals from the United States court for China, as provided in the Act entitled "An Act creating a United States court for China and prescribing the jurisdiction thereof," approved June thirtieth, nineteen hundred and six.

Sec. 132. Any judge of a circuit court of appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively.

Sec. 133. The circuit courts of appeals, in cases in which their judgments and decrees are made final by this title, shall have appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of Arizona and New Mexico, as by this title they may have to review the judgments, orders, and decrees of the district courts; and for that purpose said Territories shall, by orders of the Supreme Court of the United States, to be made from time to time, be assigned to particular circuits.

Sec. 134. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section two hundred and forty-seven, in which the amount involved or the value of the subject-matter in controversy shall exceed five hundred dollars, and in all criminal cases, writs of error and appeals shall lie from the district court for Alaska or from any division thereof, to the circuit court of appeals for the ninth circuit, and the judgments, orders, and decrees of said court shall be final in all such cases. But whenever such circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any such case, the court may certify such question or proposition to the Supreme Court, and thereupon the Supreme Court shall give its instruction upon the question or proposition certified to it, and its instructions shall be binding upon the circuit court of appeals.

Sec. 135. All appeals, and writs of error, and other cases, coming from the district court for the district of Alaska to the circuit court of appeals



for the ninth circuit, shall be entered upon the docket and heard at San Francisco, California, or at Portland, Oregon, or at Seattle, Washington, as the trial court before whom the case was tried below shall fix and determine: *Provided*, That at any time before the hearing of any appeal, writ of error, or other case, the parties thereto, through their respective attorneys, may stipulate at which of the above-named places the same shall be heard, in which case the case shall be remitted to and entered upon the docket at the place so stipulated and shall be heard there.

## CHAPTER SEVEN.

## THE COURT OF CLAIMS.

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| <p>Sec.<br/>136. Appointment, oath, and salary of judges.<br/>137. Seal.<br/>138. Session; quorum.<br/>139. Officers of the court.<br/>140. Salaries of officers.<br/>141. Clerk's bond.<br/>142. Contingent fund.<br/>143. Reports to Congress; copies for departments, etc.<br/>144. Members of Congress not to practice in the court.<br/>145. Jurisdiction.<br/>    Par. 1. Claims against the United States.<br/>        2. Set-offs.<br/>        3. Disbursing officers.<br/>146. Judgments for set-off or counter-claims; how enforced.<br/>147. Decree on accounts of disbursing officers.<br/>148. Claims referred by departments.<br/>149. Procedure in cases transmitted by departments.<br/>150. Judgments in cases transmitted by departments; how paid.<br/>151. Either House of Congress may refer certain claims to court.<br/>152. Costs may be allowed prevailing party.<br/>153. Claims growing out of treaties not cognizable therein.<br/>154. Claims pending in other courts.<br/>155. Aliens.<br/>156. All claims to be filed within six years; exceptions.<br/>157. Rules of practice; may punish contempt.<br/>    S. Eq.—60.</p> | <p>Sec.<br/>158. Oaths and acknowledgments.<br/>159. Petitions and verification.<br/>160. Petition dismissed, when.<br/>161. Burden of proof and evidence as to loyalty.<br/>162. Claims for proceeds arising from sales of abandoned property.<br/>163. Commissioners to take testimony.<br/>164. Power to call upon departments for information.<br/>165. When testimony not to be taken.<br/>166. Examination of claimant.<br/>167. Testimony; where taken.<br/>168. Witnesses before commissioners.<br/>169. Cross-examinations.<br/>170. Witnesses; how sworn.<br/>171. Fees of commissioners, by whom paid.<br/>172. Claims forfeited for fraud.<br/>173. Claims under act of June 10, 1874.<br/>174. New trial on motion of claimant.<br/>175. New trial on motion of United States.<br/>176. Cost of printing record.<br/>177. No interest on claims.<br/>178. Effect of payment of judgment.<br/>179. Final judgments a bar.<br/>180. Debtors to the United States may have amount due ascertained.<br/>181. Appeals.<br/>182. Appeals in Indian cases.</p> |
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Sec.	Sec.
183. Attorney General's report to Congress.	186. Persons not to be excluded as witnesses on account of color or because of interest; plaintiff may be witness for Government.
184. Loyalty a jurisdictional fact in certain cases.	
185. Attorney General to appear for the defense.	187. Reports of court to Congress.

Sec. 136. The Court of Claims, established by the Act of February twenty-fourth, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The chief justice shall be entitled to receive an annual salary of six thousand five hundred dollars, and each of the other judges an annual salary of six thousand dollars, payable monthly, from the Treasury.

Sec. 137. The Court of Claims shall have a seal, with such device as it may order.

Sec. 138. The Court of Claims shall hold one annual session at the city of Washington, beginning on the first Monday in December and continuing as long as may be necessary for the prompt disposition of the business of the court. Any three of the judges of said court shall constitute a quorum, and may hold a court for the transaction of business: *Provided*, That the concurrence of three judges shall be necessary to the decision of any case.

Sec. 139. The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a chief messenger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause.

Sec. 140. The salary of the chief clerk shall be three thousand five hundred dollars a year; of the assistant clerk two thousand five hundred dollars a year; of the bailiff one thousand five hundred dollars a year, and of the chief messenger one thousand dollars a year, payable monthly from the Treasury.

Sec. 141. The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the Secretary of the Treasury.

Sec. 142. The said clerk shall have authority when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the Treasury in the same way as the accounts of other disbursing agents of the Government are settled.

Sec. 143. On the first day of every regular session of Congress, the clerk of the Court of Claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. At the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the Solicitor, the Comptroller, and the Auditors of the Treasury; to the Commissioner of the General Land Office and of Indian Affairs; to the chiefs of bureaus, and to other officers charged with the adjustment of claims against the United States.

Sec. 144. Whoever, being elected or appointed a Senator, Member of, or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment, and either before or after he has qualified, and during his continuance in office, practice in the Court of Claims, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States.

Sec. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under this chapter until an account for said fees shall have been rendered and finally acted upon as required by law, unless the proper accounting officer of the Treasury fails to act finally thereon within six months after the account is received in said office.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of

loss by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Sec. 146. Upon the trial of any cause in which any set-off, counter-claim, claim for damages, or other demand is set up on the part of the Government against any person making claim against the Government in said court, the court shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced.

Sec. 147. Whenever the Court of Claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed as a credit in the settlement of his accounts.

Sec. 148. When any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents, and proofs pertaining thereto, to the Court of Claims and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted for its guidance and action: *Provided, however,* That if it shall have been transmitted with the consent of the claimant, or if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, in the latter case giving to either party such further opportunity for hearing as in its judgment justice shall require, and shall report its findings therein to the department by which the same was referred to said court. The Secretary of the Treasury may, upon the certificate of any auditor, or of the Comptroller of the Treasury, direct any claim or matter, of which, by reason of the subject matter or character, the said court might under existing laws, take jurisdiction on the voluntary action of the claimant, to be transmitted, with all the vouchers, papers, documents and proofs pertaining thereto, to the said court for trial and adjudication.

Sec. 149. All cases transmitted by the head of any department, or upon the certificate of any auditor, or of the Comptroller of the Treasury, according to the provisions of the preceding section, shall be proceeded

in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations.

Sec. 150. The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court.

Sec. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitations should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however,* That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

Sec. 152. If the Government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

Sec. 153. The jurisdiction of the said court shall not extend to any claim against the Government not pending therein on December first, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

Sec. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court an appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto,

acting or professing to act, mediately or immediately, under the authority of the United States.

Sec. 155. Aliens who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction.

Sec. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Sec. 157. The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.

Sec. 158. The judges and clerks of said court may administer oaths and affirmations, taking acknowledgments of instruments in writing, and give certificates of the same.

Sec. 159. The claimant shall in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had, what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim or of any part thereof or interest therein has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets; that the claimant and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the Government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and that he believes the facts as stated in the said petition to be true. The said petition shall be verified by the affidavit of the claimant, his agent or attorney.

Sec. 160. The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the Government may be traversed by the Government, and if on the trial such

issues shall be decided against the claimant, his petition shall be dismissed.

Sec. 161. Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to forces or government of the late Confederate States during the Civil War, the claimant asserting the loyalty of any such person to the United States during such Civil War shall be required to prove affirmatively that such person did, during said Civil War, consistently adhere to the United States and did give no aid or comfort to persons engaged in said Confederate service in said Civil War.

Sec. 162. The Court of Claims shall have jurisdiction to hear and determine the claims of those whose property was taken subsequent to June the first, eighteen hundred and sixty-five, under the provisions of the Act of Congress approved March twelfth, eighteen hundred and sixty-three, entitled "An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," and Acts amendatory thereof where the property so taken was sold and the net proceeds thereof was placed in the Treasury of the United States; and the Secretary of the Treasury shall return said net proceeds to the owners thereof, on the judgment of said court, and full jurisdiction is given to said court to adjudge said claims, any statutes of limitations to the contrary notwithstanding.

Sec. 163. The Court of Claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it, to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States.

Sec. 164. The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed records made by the committees of each House of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest.

Sec. 165. When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.

Sec. 166. The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by the said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof. And if any claimant, after such order is made and due and reasonable notice thereof is given to him,

fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises.

Sec. 167. The testimony in cases pending before the Court of Claims shall be taken in the county where the witness resides, when the same can be conveniently done.

Sec. 168. The Court of Claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein. Such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish.

Sec. 169. In taking testimony to be used in support of any claim, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations.

Sec. 170. The commissioner taking testimony to be used in the Court of Claims shall administer an oath or affirmation to the witness brought before him for examination.

Sec. 171. When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the Government, such fees shall be paid out of the contingent fund provided for the Court of Claims, or other appropriation made by Congress for that purpose.

Sec. 172. Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government, and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same.

Sec. 173. No claim shall be allowed by the accounting officers under the provisions of the Act of Congress approved June sixteenth, eighteen hundred and seventy-four, or by the Court of Claims, or by Congress, to any person where such claimant, or those under whom he claims, shall wilfully, knowingly, and with intent to defraud the United States, have claimed more than was justly due in respect of such claim, or presented any false evidence to Congress, or to any department or court, in support thereof.

Sec. 174. When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common



law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Sec. 175. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.

Sec. 176. There shall be taxed against the losing party in each and every cause pending in the Court of Claims the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerk of said court and paid into the Treasury of the United States.

Sec. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

Sec. 178. The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.

Sec. 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

Sec. 180. Whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer or agent or contractor so indebted, or that he or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States had arisen and exists, and that he or the person he represents has applied to the proper department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application, and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the Attorney General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice

shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court; and unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. The provisions of section one hundred and sixty-six shall apply to cases under this section.

Sec. 181. The plaintiff or the United States, in any suit brought under the provision of the section last preceding, shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

Sec. 182. In any case brought in the Court of Claims under any Act of Congress by which that court is authorized to render a judgment or decree against the United States, or against any Indian tribe or any Indians, or against any fund held in trust by the United States for any Indian tribe or for any Indians, the claimant, or the United States, or the tribe of Indians, or other party in interest shall have the same right of appeal as is conferred under sections two hundred and forty-two and two hundred and forty-three; and such right shall be exercised only within the time and in the manner therein prescribed.

Sec. 183. The Attorney General shall report to Congress, at the beginning of each regular session, the suits under section one hundred and eighty, in which a final judgment or decree has been rendered, giving the date of each and a statement of the costs taxed in each case.

Sec. 184. In any case of a claim for supplies or stores taken by or furnished to any part of the military or naval forces of the United States for their use during the late Civil War, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the Government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the Government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed.

Sec. 185. The Attorney-General, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the Court of Claims under the provisions of this chapter, with the same power to interpose counter claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is required to defend the United States in said court.

Sec. 186. No person shall be excluded as a witness in the Court of Claims on account of color, because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

Sec. 187. Reports of the Court of Claims to Congress, under sections one hundred and forty-eight and one hundred and fifty-one, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon.

## CHAPTER EIGHT.

### THE COURT OF CUSTOMS APPEALS.

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| <p>Sec.<br/>188. Court of Customs Appeals; appointment and salary of judges; quorum; circuit and district judges may act in place of judge disqualified, etc.</p> <p>189. Court to be always open for business; terms may be held in any circuit; when expenses of judges to be paid.</p> <p>190. Marshal of the court; appointment, salary, and duties.</p> <p>191. Clerk of the court; appointment, salary, and duties.</p> <p>192. Assistant clerk, stenographic clerks, and reporter; appointment, salary, and duties.</p> <p>193. Rooms for holding court to be provided; bailiffs and messengers.</p> <p>194. To be a court of record; to prescribe form and style of seal, and establish rules and regulations; may affirm, modify, or reverse and remand case, etc.</p> | <p>Sec.<br/>195. Final decisions of Board of General Appraisers to be reviewed only by Customs Court.</p> <p>196. Other courts deprived of jurisdiction in customs cases; pending cases excepted.</p> <p>197. Transfer to Customs Court of pending cases; completion of testimony.</p> <p>198. Appeals from Board of General Appraisers; time within which to be taken; record to be transmitted to Customs Court.</p> <p>199. Records filed in Customs Court to be at once placed on calendar; calendar to be called every sixty days.</p> |
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Sec. 188. There shall be a United States Court of Customs Appeals, which shall consist of a presiding judge and four associate judges, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive a salary of seven thousand dollars a year. The presiding judge shall be so designated in the order of appointment and in the commission issued to him by the President; and the associate judges shall have precedence according to the date of their commissions. Any three members of said court shall constitute a quorum, and the concurrence of three members shall be necessary to any decision thereof. In case of a vacancy or of the temporary inability or disqualification, for any reason, of one or two of the judges of said court, the President may, upon the request of the presiding judge of said court,

designate any qualified United States circuit or district judge or judges to act in his or their place; and such circuit or district judges shall be duly qualified to so act.

Sec. 189. The said Court of Customs Appeals shall always be open for the transaction of business, and sessions thereof may, in the discretion of the court, be held in the several judicial circuits, and at such places as said court may from time to time designate. Any judge who, in pursuance of the provisions of this chapter, shall attend a session of said court at any place other than the city of Washington, shall be paid, upon his written and itemized certificate, by the marshal of the district in which the court shall be held, his actual and necessary expenses incurred for travel and attendance, and the actual and necessary expenses of one stenographic clerk who may accompany him; and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

Sec. 190. Said court shall have the services of a marshal, with the same duties and powers, under the regulations of the court, as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. Said services within the District of Columbia shall be performed by a marshal to be appointed by and to hold office during the pleasure of the court, who shall receive a salary of three thousand dollars per annum. Said services outside of the District of Columbia shall be performed by the United States marshals in and for the districts where sessions of said court may be held; and to this end said marshals shall be the marshals of said court. The marshal of said court for the District of Columbia, is authorized to purchase, under the direction of the presiding judge, such books, periodicals, and stationery, as may be necessary for the use of said court; and such expenditures shall be allowed and paid by the Secretary of the Treasury upon claim duly made and approved by said presiding judge.

Sec. 191. The court shall appoint a clerk, whose office shall be in the city of Washington, District of Columbia, and who shall perform and exercise the same duties and powers in regard to all matters within the jurisdiction of said court as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the clerk shall be three thousand five hundred dollars per annum, which sum shall be in full payment for all services rendered by such clerk; and all fees of any kind whatever, and all costs shall be by him turned into the United States Treasury. Said clerk shall not be appointed by the court or any judge thereof as a commissioner, master, receiver, or referee. The costs and fees in the said court be fixed and established by said court in a table of fees to be adopted and approved by the Supreme Court of the United States within four months after the organization of said court: *Provided*, That the costs and fees so fixed shall not, with respect to any item, exceed the costs and fees charged in the Supreme Court of the United States; and the same shall be expended, accounted for, and paid over to the Treasury of the United States.

Sec. 192. In addition to the clerk, the court may appoint an assistant clerk at a salary of two thousand dollars per annum, five stenographic clerks at a salary of one thousand six hundred dollars per annum each, one stenographic reporter at a salary of two thousand five hundred dollars per annum, and a messenger at a salary of eight hundred and forty dollars per annum, all payable in equal monthly installments, and all of whom, including the clerk, shall hold office during the pleasure of and perform such duties as are assigned them by the court. Said reporter shall prepare and transmit to the Secretary of the Treasury once a week in time for publication in the Treasury Decisions copies of all decisions rendered to that date by said court, and prepare and transmit, under the direction of said court, at least once a year, reports of said decisions rendered to that date, constituting a volume, which shall be printed by the Treasury Department in such numbers and distributed or sold in such manner as the Secretary of the Treasury shall direct.

Sec. 193. The marshal of said court for the District of Columbia and the marshals of the several districts in which said Court of Customs Appeals may be held shall, under the direction of the Attorney General, and with his approval, provide such rooms in the public buildings of the United States as may be necessary for said court: *Provided*, That in case proper rooms can not be provided in such buildings, then the said marshals, with the approval of the Attorney-General, may, from time to time, lease such rooms as may be necessary for said court. The bailiffs and messengers of said court shall be allowed the same compensation for their respective services as are allowed for similar services in the existing district courts. In no case shall said marshals secure other rooms than those regularly occupied by existing district courts, or other public officers, except where such can not, by reason of actual occupancy or use, be occupied or used by said Court of Customs Appeals.

Sec. 194. The said Court of Customs Appeals shall be a court of record, with jurisdiction as in this chapter established and limited. It shall prescribe the form and style of its seal, and the form of its writs and other process and procedure, and exercise such powers conferred by law as may be conformable and necessary to the exercise of its jurisdiction. It shall have power to establish all rules and regulations for the conduct of the business of the court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law. It shall have power to review any decision or matter within its jurisdiction, and may affirm, modify, or reverse the same and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all

appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases.

Sec. 196. After the organization of said court, no appeal shall be taken or allowed from any Board of United States General Appraisers to any other court, and no appellate jurisdiction shall thereafter be exercised or allowed by any other courts in cases decided by said Board of United States General Appraisers; but all appeals allowed by law from such Board of General Appraisers shall be subject to review only in the Court of Customs Appeals hereby established, according to the provisions of this chapter: *Provided*, That nothing in this chapter shall be deemed to deprive the Supreme Court of the United States of jurisdiction to hear and determine all customs cases which have heretofore been certified to said court from the United States circuit courts of appeals on applications for writs of certiorari or otherwise, nor to review by writ of certiorari any customs case heretofore decided or now pending and hereafter decided by any circuit court of appeals, provided application for said writ be made within six months after August fifth, nineteen hundred and nine: *Provided further*, That all customs cases decided by a circuit or district court of the United States or a court of a Territory of the United States prior to said date above mentioned, and which have not been removed from said courts by appeal or writ of error, and all such cases theretofore submitted for decision in said courts and remaining undecided may be reviewed on appeal at the instance of either party by the United States Court of Customs Appeals, provided such appeal be taken within one year from the date of the entry of the order, judgment, or decrees sought to be reviewed.

Sec. 197. Immediately upon the organization of the Court of Customs Appeals, all cases within the jurisdiction of that court pending and not submitted for decision in any of the United States circuit courts of appeals, United States circuit, territorial or district courts, shall, with the record and samples therein, be certified by said courts to said Court of Customs Appeals for further proceedings in accordance herewith: *Provided*, That where orders for the taking of further testimony before a referee have been made in any of such cases, the taking of such testimony shall be completed before such certification.

Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision: *Provided*, That in Alaska and in the insular and other outside possessions of the United States ninety days shall be allowed for making such application to the Court of Customs Appeals. Such applica-

tion shall be made by filing in the office of the clerk of said court a concise statement of errors of law and fact complained of; and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall immediately order the Board of General Appraisers to transmit to said court the record and evidence taken by them, together with the certified statement of the facts involved in the case and their decision thereon; and all the evidence taken by and before said board shall be competent evidence before said Court of Customs Appeals. The decision of said Court of Customs Appeals shall be final, and such cause shall be remanded to said Board of General Appraisers for further proceedings to be taken in pursuance of such determination.

Sec. 199. Immediately upon receipt of any record transmitted to said court for determination the clerk thereof shall place the same upon the calendar for hearing and submission; and such calendar shall be called and all cases thereupon submitted, except for good cause shown, at least once every sixty days: *Provided*, That such calendar need not be called during the months of July and August of any year.

## CHAPTER NINE.

### THE COMMERCE COURT.

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| <p>Sec.<br/>200. Commerce Court created; judges of, appointment and designation; expense allowance to judges.</p> <p>201. Additional circuit judges; appointment and assignment.</p> <p>202. Officers of the court; clerk, marshal, etc.; salaries, etc.</p> <p>203. Court to be always open for business; sessions of, to be held in Washington and elsewhere.</p> <p>204. Marshals to provide rooms for holding court outside of Washington.</p> <p>205. Assignment of judges to other duty; vacancies, how filled.</p> <p>206. Powers of court and judges; writs, process, procedure, etc.</p> <p>207. Jurisdiction of the court.</p> <p>208. Suits to enjoin, etc., orders of Interstate Commerce Commissions to be against United States; restraining orders, when granted without notice.</p> | <p>Sec.<br/>209. Jurisdiction of the court, how invoked; practice and procedure.</p> <p>210. Final judgments and decrees reviewable in Supreme Court.</p> <p>211. Suits to be against United States; when United States may intervene.</p> <p>212. Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.</p> <p>213. Complainants may appear and be made parties to case.</p> <p>214. Pending cases to be transferred to Commerce Court; exception; status of transferred cases.</p> |
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Sec. 200. There shall be a court of the United States, to be known as the Commerce Court, which shall be a court of record, and shall have a seal of such form and style as the court may prescribe. The

said court shall be composed of five judges, to be from time to time designated and assigned thereto by the Chief Justice of the United States, from among the circuit judges of the United States, for the period of five years, except that in the first instance the court shall be composed of the five additional circuit judges referred to in the next succeeding section, who shall be designated by the President to serve for one, two, three, four, and five years, respectively, in order that the period of designation of one of the said judges shall expire in each year thereafter. In case of the death, resignation, or termination of assignment of any judge so designated, the Chief Justice shall designate a circuit judge to fill the vacancy so caused and to serve during the unexpired period for which the original designation was made. After the year nineteen hundred and fourteen no circuit judge shall be redesignated to serve in the Commerce Court until the expiration of at least one year after the expiration of the period of his last previous designation. The judge first designated for the five year period shall be presiding judge of said court, and thereafter the judge senior in designation shall be the presiding judge. The associate judges shall have precedence and shall succeed to the place and powers of the presiding judge whenever he may be absent or incapable of acting in the order of the date of their designations. Four of said judges shall constitute a quorum, and at least a majority of the court shall concur in all decisions. Each of the judges during the period of his service in the Commerce Court shall, on account of the regular sessions of the court being held in the city of Washington, receive in addition to his salary as circuit judge an expense allowance at the rate of one thousand five hundred dollars per annum.

Sec. 201. The five additional circuit judges authorized by the Act to create a Commerce Court, and for other purposes, approved June eighteenth, nineteen hundred and ten, shall hold office during good behavior, and from time to time shall be designated and assigned by the Chief Justice of the United States for service in the district court of any district, or the circuit court of appeals for any circuit, or in the Commerce Court, and when so designated and assigned for service in a district court or circuit court of appeals shall have the powers and jurisdiction in this Act conferred upon a circuit judge in his circuit.

Sec. 202. The court shall also have a clerk and a marshal, with the same duties and powers, so far as they may be appropriate and are not altered by rule of the court, as are now possessed by the clerk and marshal, respectively, of the Supreme Court of the United States. The offices of the clerk and marshal of the court shall be in the city of Washington, in the District of Columbia. The judges of the court shall appoint the clerk and marshal, and may also appoint, if they find it necessary, a deputy clerk and deputy marshal; and such clerk, marshal, deputy clerk, and deputy marshal, shall hold office during the pleasure of the court. The salary of the clerk shall be four thousand dollars per annum; the salary of the marshal three thousand dollars per annum; the salary of the deputy clerk two thousand five hundred



dollars per annum; and the salary of the deputy marshal two thousand five hundred dollars per annum. The said clerk and marshal may, with the approval of the court, employ all requisite assistance. The costs and fees in said court shall be established by the court in a table thereof, approved by the Supreme Court of the United States, within four months after the organization of the court; but such costs and fees shall in no case exceed those charged in the Supreme Court of the United States, and shall be accounted for and paid into the Treasury of the United States.

Sec. 203. The Commerce Court shall always be open for the transaction of business. Its regular sessions shall be held in the city of Washington, in the District of Columbia; but the powers of the court or of any judge thereof, or of the clerk, marshal, deputy clerk, or deputy marshal, may be exercised anywhere in the United States; and for expedition of the work of the court and the avoidance of undue expense or inconvenience to suitors the court shall hold sessions in different parts of the United States as may be found desirable. The actual and necessary expenses of the judges, clerk, marshal, deputy clerk, and deputy marshal of the court incurred for travel and attendance elsewhere than in the city of Washington shall be paid upon the written and itemized certificate of such judge, clerk, marshal, deputy clerk, or deputy marshal, by the marshal of the court, and shall be allowed to him in the settlement of his accounts with the United States.

Sec. 204. The United States marshals of the several districts outside of the city of Washington in which the Commerce Court may hold its sessions shall provide, under the direction and with the approval of the Attorney General, such rooms in the public buildings of the United States as may be necessary for the court's use; but in case proper rooms can not be provided in such public buildings, said marshals, with the approval of the Attorney General, may then lease from time to time other necessary rooms for the court.

Sec. 205. If, at any time, the business of the Commerce Court does not require the services of all the judges, the Chief Justice of the United States may, by writing, signed by him and filed in the Department of Justice, terminate the assignment of any of the judges or temporarily assign him for service in any district court or circuit court of appeals. In cases of illness or other disability of any judge assigned to the Commerce Court the Chief Justice of the United States may assign any other circuit judge of the United States to act in his place, and may terminate such assignment when the exigency therefor shall cease; and any circuit judge so assigned to act in place of such judge shall, during his assignment, exercise all the powers and perform all the functions of such judge.

Sec. 206. In all cases within its jurisdiction the Commerce Court, and each of the judges assigned thereto, shall, respectively, have and may exercise any and all of the powers of a district court of the United States and of the judges of said court, respectively, so far as the same may be appropriate to the effective exercise of the jurisdiction hereby

conferred. The Commerce Court may issue all writs and process appropriate to the full exercise of its jurisdiction and powers and may prescribe the form thereof. It may also, from time to time, establish such rules and regulations concerning pleading, practice, or procedure in cases or matters within its jurisdiction as to the court shall seem wise and proper. Its orders, writs, and process may run, be served, and be returnable anywhere in the United States; and the marshal and deputy marshal of said court and also the United States marshals and deputy marshals in the several districts of the United States shall have like powers and be under like duties to act for and in behalf of said court as pertain to United States marshals and deputy marshals generally when acting under like conditions concerning suits or matters in the district courts of the United States.

Sec. 207. The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

Sec. 208. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the Commerce Court otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner, said court, or a judge thereof may, on hearing after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of such court or judge, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until its decision upon the application.

Sec. 209. The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Sec. 210. A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after

the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Sec. 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney-General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are inter-

ested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Sec. 213. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

Sec. 214. Until the opening of the Commerce Court, all cases and proceedings of which from that time the Commerce Court is hereby given exclusive jurisdiction may be brought in the same courts and conducted in like manner and with like effect as is now provided by law; and if any such case or proceeding shall have gone to final judgment or decree before the opening of the Commerce Court, appeal may be taken from such final judgment or decree in like manner and with like effect as is now provided by law. Any such case or proceeding within the jurisdiction of the Commerce Court which may have been begun in any other court as hereby allowed, before the said date, shall be forthwith transferred to the Commerce Court, if it has not yet proceeded to final judgment or decree in such other court unless it has been finally submitted for the decision of such court, in which case the cause shall proceed in such court to final judgment or decree and further proceeding thereafter, and appeal may be taken direct to the Supreme Court; and if remanded, such cause may be sent back to the court from which the appeal was taken or to the Commerce Court for further proceeding as the Supreme Court shall direct. All previous proceedings in such transferred case shall stand and operate notwithstanding the transfer, subject to the same control over them by the Commerce Court and to the same right of subsequent action in the case or proceeding as if the transferred case or proceeding had been originally begun in the Commerce Court. The clerk of the court from which any case or proceeding is so transferred to the Commerce Court shall transmit to and file in the Commerce Court the originals of all papers filed in such case or proceeding and a certified transcript of all record entries in the case or proceeding up to the time of transfer.

## CHAPTER TEN.

## THE SUPREME COURT.

Sec.	Sec.
215. Number of justices.	240. Certiorari to circuit court of appeals.
216. Precedents of the associate justices.	241. Appeals and writs of error in other cases.
217. Vacancy in the office of Chief Justice.	242. Appeals from Court of Claims.
218. Salaries of justices.	243. Time and manner of appeals from the Court of Claims.
219. Clerk, marshal, and reporter.	244. Writs of error and appeals from supreme court of and United States district court of Porto Rico.
220. The clerk to give bond.	245. Writs of error and appeals from the Supreme Courts of Arizona and New Mexico.
221. Deputies of the clerk.	246. Writs of error and appeals from the Supreme Court of Hawaii.
222. Records of the old court of appeals.	247. Appeals and writs of error from the district court for Alaska direct to Supreme Court in certain cases.
223. Tables of fees.	248. Appeals and writs of error from the Supreme Court of the Philippine Islands.
224. Marshal of the Supreme Court.	249. Appeals and writs of error when a Territory becomes a State.
225. Duties of the reporter.	250. Appeals and writs of error from the Court of Appeals of the District of Columbia.
226. Reporter's salary and allowances.	251. Certiorari to Court of Appeals, District of Columbia.
227. Distribution of reports and digests.	252. Appellate jurisdiction under the bankruptcy act.
228. Additional reports and digests; limitation upon cost; estimates to be submitted to Congress annually.	253. Precedence of writs of error to State courts.
229. Distribution of Federal Reporter, etc., and Digests.	254. Cost of printing records.
230. Terms.	255. Women may be admitted to practice.
231. Adjournment for want of a quorum.	
232. Certain orders made by less than quorum.	
233. Original disposition.	
234. Writs of prohibition and mandamus.	
235. Issues of fact.	
236. Appellate jurisdiction.	
237. Writs of error from judgments and decrees of State courts.	
238. Appeals and writs of error from United States district courts.	
239. Circuit court of appeals may certify questions to Supreme Court for instructions.	

Sec. 215. The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

Sec. 216. The associate justices shall have precedence according to the dates of their commissions, or, when the commissions of two or more of them bear the same date, according to their ages.

Sec. 217. In case of a vacancy in the office of Chief Justice, or of his

inability to perform the duties and powers of his office, they shall devolve upon the associate justice who is first in precedence, until such disability is removed, or another Chief Justice is appointed and duly qualified. This provision shall apply to every associate justice who succeeds to the office of Chief Justice.

Sec. 218. The Chief Justice of the Supreme Court of the United States shall receive the sum of fifteen thousand dollars a year, and the justices thereof shall receive the sum of fourteen thousand five hundred dollars a year each, to be paid monthly.

Sec. 219. The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions.

Sec. 220. The clerk of the Supreme Court shall, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court, to the United States, in the sum of not less than five thousand and not more than twenty thousand dollars, to be determined and regulated by the Attorney General, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. The Supreme Court may at any time, upon the motion of the Attorney General, to be made upon thirty days' notice, require a new bond, or a bond for an increased amount within the limits above prescribed; and the failure of the clerk to execute the same shall vacate his office. All bonds given by the clerk shall, after approval, be recorded in his office, and copies thereof from the records, certified by the clerk under seal of the court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice.

Sec. 221. One or more deputies of the clerk of the Supreme Court may be appointed by the court on the application of the clerk, and may be removed at the pleasure of the court. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk in his name until a clerk is appointed and qualified; and for the defaults or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk, and his estate, and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such defaults or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

Sec. 222. The records and proceedings of the court of appeals, appointed previous to the adoption of the present Constitution, shall be kept in the office of the clerk of the Supreme Court, who shall give copies thereof to any person requiring and paying for them, in the manner provided by law for giving copies of the records and proceedings of the Supreme Court; and such copies shall have like faith and credit with all other proceedings of said court.

Sec. 223. The Supreme Court is authorized and empowered to prepare the tables of fees to be charged by the clerk thereof.

Sec. 224. The marshal is entitled to receive a salary at the rate of four thousand five hundred dollars a year. He shall attend the court

at its sessions; shall serve and execute all process and orders issuing from it, or made by the Chief Justice or an associate justice in pursuance of law; and shall take charge of all property of the United States used by the court or its members. With the approval of the Chief Justice he may appoint assistants and messengers to attend the court, with the compensation allowed to officers of the House of Representatives of similar grade.

Sec. 225. The reporter shall cause the decisions of the Supreme Court to be printed and published within eight months after they are made; and within the same time he shall deliver three hundred copies of the volumes of said reports to the Attorney General. The reporter shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said decisions, of which he shall deliver a like number of copies in like manner and time.

Sec. 226. The reporter shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume; and said reporter shall be annually entitled to clerk hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars: *Provided*, That the volumes of the decisions of the court heretofore published shall be furnished by the reporter to the public at a sum not exceeding two dollars per volume, and those hereafter published at a sum not exceeding one dollar and seventy-five cents per volume; and the number of volumes now required to be delivered to the Attorney General shall be furnished by the reporter without any charge therefor. Said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding one dollar and seventy-five cents a volume.

Sec. 227. The Attorney General shall distribute copies of the Supreme Court reports, as follows: To the President, the justices of the Supreme Court, the judges of the Commerce Court, the judges of the Court of Customs Appeals, the judges of the circuit courts of appeals, the judges of the district courts, the judges of the Court of Claims, the judges of the Court of Appeals and of the Supreme Court of the District of Columbia, the judges of the several Territorial courts, the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Postmaster General, the Attorney General, the Secretary of Agriculture, the Secretary of Commerce and Labor, the Solicitor General, the Assistant to the Attorney General, each Assistant Attorney General, each United States district attorney, each Assistant Secretary of each Executive Department, the Assistant Postmasters General, the Secretary of the Senate for the use of the Senate, the clerk of the House of Representatives for the use of the



House of Representatives, the Governors of the Territories, the Solicitor for the Department of State, the Treasurer of the United States, the Solicitor of the Treasury, the Register of the Treasury, the Comptroller of the Treasury, the Comptroller of the Currency, the Commissioner of Internal Revenue, the Director of the Mint, each of the six Auditors in the Treasury Department, the Judge Advocate General, War Department, the Paymaster General, War Department, the Judge Advocate General, Navy Department, the Commissioner of Indian Affairs, the Commissioner of Pensions, the Commissioner of the General Land Office, the Commissioner of Patents, the Commissioner of Education, the Commissioner of Labor, the Commissioner of Navigation, the Commissioner of Corporations, the Commissioner General of Immigration, the Chief of the Bureau of Manufactures, the Director of the Geological Survey, the Director of the Census, the Forester, Department of Agriculture, the Purchasing Agent, Post Office Department, the Interstate Commerce Commission, the Clerk of the Supreme Court of the United States, the Marshal of the Supreme Court of the United States, the Attorney for the District of Columbia, the Naval Academy at Annapolis, the Military Academy at West Point, and the heads of such other executive offices as may be provided by law, of equal grade with any of said offices, each one copy; to the Law Library of the Supreme Court, twenty-five copies; to the Law Library of the Department of the Interior, two copies; to the Law Library of the Department of Justice, two copies; to the Secretary of the Senate for the use of the committees of the Senate, twenty-five copies; to the Clerk of the House of Representatives for the use of the committees of the House, thirty copies; to the Marshal of the Supreme Court of the United States, as custodian of the public property used by the court, for the use of the justices thereof in the conference room, robing room, and court room, three copies; to the Secretary of War for the use of the proper courts and officers of the Philippine Islands and for the headquarters of military departments in the United States, twelve copies; and to each of the places where district courts of the United States are now holden, including Hawaii, and Porto Rico, one copy. He shall also distribute one complete set of said reports, and one set of the digests thereof, to such executive officers as are entitled to receive said reports under this section and have not already received them, to each United States judge and to each United States district attorney who has not received a set, to each of the places where district courts are now held to which said reports have not been distributed, and to each of the places at which a district court may hereafter be held, the edition of said reports and digests to be selected by the judge or officer receiving them. No distribution of reports and digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of said courts (except the Supreme Court) shall in all cases keep said reports and digest for the use of the courts and of the officers thereof.

Such reports and digest shall remain the property of the United States and shall be preserved by the officers above named and by them turned over to their successors in office.

Sec. 228. The publishers of the decisions of the Supreme Court shall deliver to the Attorney General, in addition to the three hundred copies delivered by the Reporter, such number of copies of each report heretofore published, as the Attorney General may require, for which he shall pay not more than two dollars per volume, and such number of copies of each report hereafter published as he may require, for which he shall pay not more than one dollar and seventy-five cents per volume. The Attorney General shall include in his annual estimates submitted to Congress, an estimate for the current volumes of such reports, and also for the additional sets of reports and digests required for distribution under the section last preceding.

Sec. 229. The Attorney General is authorized to procure complete sets of the Federal Reporter or, in his discretion, other publication containing the decisions of the circuit courts of appeals, circuits courts, and district courts, and digests thereof, and also future volumes of the same as issued, and distribute a copy of each such reports and digests to each place where a circuit court of appeals, or a district court, is now or may hereafter regularly be held, and to the Supreme Court of the United States, the Court of Claims, the court of Customs Appeals, the Commerce Court, the Court of Appeals and the Supreme Court of the District of Columbia, the Attorney General, the Solicitor General, the Solicitor of the Treasury, the Assistant Attorney General for the Department of the Interior, the Commissioner of Patents, and the Interstate Commerce Commission; and to the Secretary of the Senate, for the use of the Senate, and to the Clerk of the House of Representatives, for the use of the House of Representatives, not more than three sets each. Whenever any such court room, office, or officer shall have a partial or complete set of any such reports, or digests, already purchased or owned by the United States, the Attorney General shall distribute to such court room, office, or officer, only sufficient volumes to make a complete set thereof. No distribution of reports or digests under this section shall be made to any place where the court is held in a building not owned by the United States, unless there be at such place a United States officer to whose responsible custody they can be committed. The clerks of the courts (except the Supreme Court) to which the reports and digests are distributed under this section, shall keep such reports and digests for the use of the courts and the officers thereof. All reports and digests distributed under the provisions of this section shall be and remain the property of the United States and, before distribution, shall be plainly marked on their covers with the words "The Property of the United States," and shall be transmitted by the officers receiving them to their successors in office. Not to exceed two dollars per volume shall be paid for the back and current volumes of the Federal Reporter or other publication purchased under the provisions of this section, and not to exceed five dollars per volume for the digest,

the said money to be disbursed under the direction of the Attorney General; and the Attorney General shall include in his annual estimates submitted to Congress, an estimate for the back and current volumes of such reports and digests, the distribution of which is provided for in this section.

Sec. 230. The Supreme Court shall hold at the seat of government, one term annually, commencing on the second Monday in October, and such adjourned or special terms as it may find necessary for the dispatch of business.

Sec. 231. If, at any session of the Supreme Court, a quorum does not attend on the day appointed for holding it, the justices who do attend may adjourn the court from day to day for twenty days after said appointed time, unless there be sooner a quorum. If a quorum does not attend within said twenty days the business of the court shall be continued over till the next appointed session; and if, during a term, after a quorum has assembled, less than that number attend on any day, the justices attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

Sec. 232. The justices attending at any term, when less than a quorum is present, may, within the twenty days mentioned in the preceding section, make all necessary orders touching any suit, proceeding, or process, depending in or returned to the court, preparatory to the hearing, trial, or decision thereof.

Sec. 233. The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.

Sec. 234. The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party.

Sec. 235. The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.

Sec. 236. The Supreme Court shall have appellate jurisdiction in the cases hereinafter specially provided for.

Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their valid-

ity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ.

Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Sec. 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the

United States where the matter in controversy shall exceed one thousand dollars, besides costs.

Sec. 242. An appeal to the Supreme Court shall be allowed on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court as provided in section one hundred and seventy-two.

Sec. 243. All appeals from the Court of Claims shall be taken within ninety days after the judgment is rendered, and shall be allowed under such regulations as the Supreme Court may direct.

Sec. 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts.

Sec. 245. Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territories of Arizona and New Mexico may be taken and prosecuted to the Supreme Court of the United States in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Sec. 246. Writs of error and appeals from the final judgments and decrees of the supreme court of the Territory of Hawaii may be taken and prosecuted to the Supreme Court of the United States, within the same time, in the same manner, under the same regulations, and in the same classes of cases, in which writs of error and appeals from the final judgments and decrees of the highest court of a State in which a decision in the suit could be had, may be taken and prosecuted to the Supreme Court of the United States under the provisions of section two hundred and thirty-seven; and also in all cases wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party

or of other competent witnesses, exceeds the sum or value of five thousand dollars.

Sec. 247. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the district court for the district of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: In prize cases; and in all cases which involve the construction or application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, or in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court.

Sec. 248. The Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby, in which the Constitution, or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court on appeal or writ of error by the party aggrieved, within the same time, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the district courts of the United States.

Sec. 249. In all cases where the judgment or decree of any court of a Territory might be reviewed by the Supreme Court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such Territory has, after such judgment or decree, been admitted as a State; and the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.

Sec. 250. Any final judgment or decree of the court of appeals of the District of Columbia may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in the following cases:

First. In cases in which the jurisdiction of the trial court is in issue; but when any such case is not otherwise reviewable in said Supreme Court, then the question of jurisdiction alone shall be certified to said Supreme Court for decision.

Second. In prize cases.

Third. In cases involving the construction or application of the Con-

stitution of the United States, or the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority.

Fourth. In cases in which the constitution, or any law of a State, is claimed to be in contravention of the Constitution of the United States.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

Sixth. In cases in which the construction of any law of the United States is drawn in question by the defendant.

Except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases arising under the patent laws, the copyright laws, the revenue laws, the criminal laws, and in admiralty cases; and, except as provided in the next succeeding section, the judgments and decrees of said court of appeals shall be final in all cases not reviewable as hereinbefore provided.

Writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the circuit courts of appeals to the Supreme Court of the United States.

Sec. 251. In any case in which the judgment or decree of said court of appeals is made final by the section last preceding, it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to it for its review and determination, with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court. It shall also be competent for said court of appeals, in any case in which its judgment or decree is made final under the section last preceding, at any time to certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for their proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon said court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 252. The Supreme Court of the United States is hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings, from the courts of bankruptcy, from which it has appellate jurisdiction in other cases; and shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

An appeal may be taken to the Supreme Court of the United States from any final decision of a court of appeals allowing or rejecting a claim under the laws relating to bankruptcy, under such rules and within such time as may be prescribed by said Supreme Court, in the following cases and no other:

First. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

Second. Where some justice of the Supreme Court shall certify that in his opinion the determination of the question involved in the allowance or rejection of such claim is essential to a uniform construction of the laws relating to bankruptcy throughout the United States.

Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

Sec. 253. Cases on writ of error to revise the judgment of a State court in any criminal case shall have precedence on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

Sec. 254. There shall be taxed against the losing party in each and every cause pending in the Supreme Court the cost of printing the record in such case, except when the judgment is against the United States.

Sec. 255. Any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the court of appeals of the District of Columbia, for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.

## CHAPTER ELEVEN.

### PROVISIONS COMMON TO MORE THAN ONE COURT.

Sec.	Sec.
256. Cases in which jurisdiction of United States courts shall be exclusive of State courts.	265. Injunctions to stay proceedings in State courts.
257. Oath of United States judges.	266. Injunctions based upon alleged unconstitutionality of State statutes; when and by whom may be granted.
258. Judges prohibited from practicing law.	267. When suits in equity may be maintained.
259. Traveling expenses, etc., of circuit justices and circuit and district judges.	268. Power to administer oaths and punish contempts.
260. Salary of judges after resignation.	269. New trials.
261. Writs of ne exeat.	270. Power to hold to security for the peace and good behavior.
262. Power to issue writs.	271. Power to enforce awards of foreign consuls, etc., in certain cases.
263. Temporary restraining orders.	
264. Injunctions; in what cases judge may grant.	



Sec.

272. Parties may manage their causes personally or by counsel.  
 273. Certain officers forbidden to act as attorneys.

Sec.

274. Penalty for violating preceding section.

Sec. 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

First. Of all crimes and offenses cognizable under the authority of the United States.

Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

Sixth. Of all matters and proceedings in bankruptcy.

Seventh. Of all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens.

Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

Sec. 257. The justices of the Supreme Court, the circuit judges, and the district judges, hereafter appointed, shall take the following oath before they proceed to perform the duties of their respective offices: "I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States: So help me God."

Sec. 258. It shall not be lawful for any judge appointed under the authority of the United States to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. Any person offending against the prohibition of this section shall be deemed guilty of a high misdemeanor.

Sec. 259. The circuit justices, the circuit and district judges of the United States, and the judges of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall each be allowed and paid his necessary expenses of travel, and his reasonable expenses (not to exceed ten dollars per day) actually incurred for maintenance, consequent upon his attending court or transacting other official business in pur-

suance of law at any place other than his official place of residence, said expenses to be paid by the marshal of the district in which such court is held or official business transacted, upon the written certificate of the justice or judge. The official place of residence of each justice and of each circuit judge while assigned to the Commerce Court shall be at Washington; and the official place of residence of each circuit and district judge, and of each judge of the district courts of the United States in Alaska, Hawaii, and Porto Rico, shall be at that place nearest his actual residence at which either a circuit court of appeals or a district court is regularly held. Every such judge shall, upon his appointment, and from time to time thereafter whenever he may change his official residence, in writing notify the Department of Justice of his official place of residence.

Sec. 260. When any judge of any court of the United States appointed to hold his office during good behavior resigns his office, after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his retirement for the office that he held at the time of his resignation.

Sec. 261. Writs of ne exeat may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any district judge, in cases where they might be granted by the district court of which he is a judge. But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

Sec. 262. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Sec. 263. Whenever notice is given of a motion for an injunction out of a district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.

Sec. 264. Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any judge of a district court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it can not be heard by the district judge of the district. In case of the absence from the dis-

strict of the district judge, or of his disability, any circuit judge of the circuit in which the district is situated may grant an injunction or restraining order in any case pending in the district court, where the same might be granted by the district judge.

Sec. 265. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

Sec. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

Sec. 267. Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

Sec. 268. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided,* That such

power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

Sec. 270. The judges of the Supreme Court and of the circuit courts of appeals and district courts, United States commissioners, and the judges and other magistrates of the several States, who are or may be authorized by law to make arrests for offenses against the United States, shall have the like authority to hold to security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective states, in cases cognizable before them.

Sec. 271. The district courts and the United States commissioners shall have power to carry into effect, according to the true intent and meaning thereof, the award or arbitration or decree of any consul, vice consul, or commercial agent of any foreign nation, made or rendered by virtue of authority conferred on him as such consul, vice consul, or commercial agent, to sit as judge or arbitrator in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to his charge, application for the exercise of such power being first made to such court or commissioner, by petition of such consul, vice consul, or commercial agent. And said courts and commissioners may issue all proper remedial process, mesne and final, to carry into full effect such award, arbitration, or decree, and to enforce obedience thereto by imprisonment in the jail or other place of confinement in the district in which the United States may lawfully imprison any person arrested under the authority of the United States, until such award, arbitration, or decree is complied with, or the parties are otherwise discharged therefrom, by the consent in writing of such consul, vice consul, or commercial agent, or his successor in office, or by the authority of the foreign government appointing such consul, vice consul, or commercial agent: *Provided, however,* That the expenses of the said imprisonment and maintenance of the prisoners, and the cost of the proceedings, shall be borne by such foreign government, or by its consul, vice consul, or commercial agent requiring such imprisonment. The marshals of the United States shall serve all such process, and do all other acts necessary and proper to carry into effect the premises, under the authority of the said courts and commissioners.

Sec. 272. In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such

counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.

Sec. 273. No clerk, or assistant or deputy clerk, of any Territorial, district, or circuit court of appeals, or of the Court of Claims, or of the Supreme Court of the United States, or marshal or deputy marshal of the United States within the district for which he is appointed, shall act as a solicitor, proctor, attorney, or counsel in any cause depending in any of said courts, or in any district for which he is acting as such officer.

Sec. 274. Whoever shall violate the provisions of the preceding section shall be stricken from the roll of attorneys by the court upon complaint, upon which the respondent shall have due notice and be heard in his defense; and in the case of a marshal or deputy marshal so acting, he shall be recommended by the court for dismissal from office.

## CHAPTER TWELVE.

### JURIES.

Sec.	Sec.
275. Qualifications and exemptions of jurors.	283. Foreman of grand jury.
276. Jurors, how drawn.	284. Grand juries, when summoned.
277. Jurors, how to be apportioned in the district.	285. Discharge of grand juries.
278. Race or color not to exclude.	286. Jurors not to serve more than once a year.
279. Venire, how issued and served.	287. Challenges.
280. Talesmen for petit juries.	288. Persons disqualified for service on jury in prosecutions for polygamy, etc.
281. Special juries.	
282. Number of grand jurors.	

Sec. 275. Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

Sec. 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately,

without reference to party affiliations until the whole number required shall be placed therein.

Sec. 277. Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service.

Sec. 278. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.

Sec. 279. Writs of venire facias, when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ. Any person named in such writ who resides elsewhere than at the place at which the court is held, shall be served by the marshal mailing a copy thereof to such person commanding him to attend as a juror at a time and place designated therein, which copy shall be registered and deposited in the post office addressed to such person at his usual post-office address. And the receipt of the person so addressed for such registered copy shall be regarded as personal service of such writ upon such person, and no mileage shall be allowed for the service of such person. The postage and registry fee shall be paid by the marshal and allowed him in the settlement of his accounts.

Sec. 280. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.

Sec. 281. When special juries are ordered in any district court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several States.

Sec. 282. Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons. If of the person summoned less than sixteen attend, they shall be placed on the grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to

the marshal to summon a sufficient number of persons for that purpose.

Sec. 283. From the persons summoned and accepted as grand jurors, the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.

Sec. 284. No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to the district judge, or the senior district judge of the district, that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. But nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of a crime or offense, or the time during which a person so accused may be held under recognizance before indictment found.

Sec. 285. The district courts, the district courts of the Territories, and the Supreme Court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such juries unnecessary.

Sec. 286. No person shall serve as a petit juror in any district court more than one term in a year; and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within one year prior to the time of such challenge.

Sec. 287. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.

Sec. 288. In any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman—

First, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offense punishable either by sections one or

three of an act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two, or by section fifty-three hundred and fifty-two of the Revised Statutes of the United States, or the Act of July first, eighteen hundred and sixty-two, entitled "An Act to punish and prevent the practice of Polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the territory of Utah;" or

Second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman.

Any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge; and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court.

But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offense above named; but if he declines to answer on any ground, he shall be rejected as incompetent.

## CHAPTER THIRTEEN.

### GENERAL PROVISIONS.

Sec.	Sec.
289. Circuit courts abolished; records of to be transferred to district courts.	293. Sections 1 to 5, Revised Statutes, to govern construction of this act.
290. Suits pending in circuit courts to be disposed of in district courts.	294. Laws revised in this act to be construed as continuations of existing laws.
291. Powers and duties of circuit courts imposed upon district courts.	295. Inference of legislative construction not to be drawn by reason of arrangement of sections.
292. References to laws revised in this act deemed to refer to sections of act.	296. Act may be designated as "The Judicial Code."

Sec. 289. The circuit courts of the United States, upon the taking effect of this act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit courts;



and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the same authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this act.

Sec. 290. All suits and proceedings pending in said circuit courts on the date of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, the record thereof being entered in the records of the circuit courts so transferred as above provided.

Sec. 291. Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

Sec. 292. Wherever, in any law not contained within this act, a reference is made to any law revised or embraced herein, such reference, upon the taking effect hereof, shall be construed to refer to the section of this act into which has been carried or revised the provision of law to which reference is so made.

Sec. 293. The provisions of sections one to five, both inclusive, of the Revised Statutes, shall apply to and govern the construction of the provisions of this act. The words "this title," wherever they occur herein, shall be construed to mean this act.

Sec. 294. The provisions of this act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

Sec. 295. The arrangement and classification of the several sections of this act have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapter under which any particular section is placed.

Sec. 296. This act may be designated and cited as "The Judicial Code."

## CHAPTER FOURTEEN.

## REPEALING PROVISIONS.

Sec.	Sec.
297. Sections, acts, and parts of acts repealed.	300. Offenses committed, and penalties, forfeitures, and liabilities incurred, how to be prosecuted and enforced.
298. Repeal not to affect tenure of office, or salary, or compensation of incumbents, etc.	301. Date this act shall be effective.
299. Accrued rights, etc., not affected.	

Sec. 297. The following sections of the Revised Statutes and acts and parts of acts are hereby repealed:

Sections five hundred and thirty to five hundred and sixty, both inclusive; sections five hundred and sixty-two to five hundred and sixty-four, both inclusive; sections five hundred and sixty-seven to six hundred and twenty-seven, both inclusive; sections six hundred and twenty-nine to six hundred and forty-seven, both inclusive; sections six hundred and fifty to six hundred and ninety-seven, both inclusive; section six hundred and ninety-nine; sections seven hundred and two to seven hundred and fourteen, both inclusive; sections seven hundred and sixteen to seven hundred and twenty, both inclusive; section seven hundred and twenty-three; sections seven hundred and twenty-five to seven hundred and forty-nine, both inclusive; sections eight hundred to eight hundred and twenty-two, both inclusive; sections ten hundred and forty-nine to ten hundred and eighty-eight, both inclusive; sections ten hundred and ninety-one to ten hundred and ninety-three, both inclusive, of the Revised Statutes.

"An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five.

Section five of an act entitled "An Act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes," approved March twenty-second, eighteen hundred and eighty-two; but sections six, seven, and eight of said act, and sections one, two, and twenty-six of an act entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two," approved March third, eighteen hundred and eighty-seven are hereby continued in force.

"An act to afford assistance and relief to Congress and executive departments in the investigation of claims and demands against the Government," approved March third, eighteen hundred and eighty-three.

"An Act regulating appeals from the supreme court of the District

of Columbia and the supreme courts of the several Territories," approved March third, eighteen hundred and eighty-five.

"An act to provide for the bringing of suits against the Government of the United States," approved March third, eighteen hundred and eighty-seven, except sections four, five, six, seven, and ten thereof.

Sections one, two, three, four, six, and seven of an act entitled "An act to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled 'An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes,' approved March third, eighteen hundred and seventy-five," approved August thirteenth, eighteen hundred and eighty-eight.

"An act to provide for the bringing of suits against the Government cases not capital and confer the same on the circuit courts of appeals," approved January twentieth, eighteen hundred and ninety-seven.

"An act to amend sections one and two of the act of March third, eighteen hundred and eighty-seven, Twenty-fourth Statutes at Large, chapter three hundred and fifty-nine," approved June twenty-seventh, eighteen hundred and ninety-eight.

"An act to amend the seventh section of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, and the several acts amendatory thereto," approved April fourteenth, nineteen hundred and six.

All acts and parts of acts authorizing the appointment of United States circuit or district judges, or creating or changing judicial circuits, or judicial districts or divisions thereof, or fixing or changing the times or places of holding court therein, enacted prior to February first, nineteen hundred and eleven.

Sections one, two, three, four, five, the first paragraph of section six, an section seventeen of an act entitled "An Act to create a commerce court, and to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten.

Also other acts and parts of acts, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act has not been passed.

Sec. 298. The repeal of existing laws providing for the appointment of judges and other officers mentioned in this act, or affecting the organization of the courts, shall not be construed to affect the tenure of office of the incumbents (except the office be abolished), but they shall continue to hold their respective offices during the terms for which appointed, unless removed as provided by law; nor (except the office be abolished)

shall such repeal affect the salary or fees or compensation of any officer or person holding office or position by virtue of any law.

Sec. 299. The repeal of existing laws, or the amendments thereof, embraced in this act, shall not affect any act done, or any right accruing or accrued, or any suit or proceeding, including those pending on writ of error, appeal, certificate, or writ of certiorari, in any appellate court referred to or included within, the provisions of this act, pending at the time of the taking effect of this act, but all such suits and proceedings, and suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made.

Sec. 300. All offenses committed, and all penalties, forfeitures, or liabilities incurred prior to the taking effect hereof, under any law embraced in, amended, or repealed by this act, may be prosecuted and punished, or sued for and recovered, in the district courts, in the same manner and with the same effect as if this act had not been passed.

Sec. 301. This act shall take effect and be in force on and after January first, nineteen hundred and twelve.

Approved, March 3, 1911.

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## JURISDICTIONAL ACTS OF 1875 AS AMENDED BY THE ACT OF 1888 IN FORCE UNTIL JANUARY 1, 1912.

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An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes.

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

### ORIGINAL JURISDICTION OF CIRCUIT COURTS.

That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, (1) where the matter in dispute exceeds exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, (2) or in which controversy the United States are plaintiffs or petitioners, (3) or in which there shall be a controversy between citizens of different

States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, (4) or a controversy between citizens of the same State claiming lands under grants of different States, (5) or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, (6) and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them.

#### PLACE OF SUIT.

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

#### SUIT BY ASSIGNEE.

Nor shall any circuit or district court have cognizance of any suit (except upon foreign bills of exchange), to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to the bearer (and be not made by any corporation), unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

#### JURISDICTION BY REMOVAL FROM STATE COURT—SUIT INVOLVING FEDERAL QUESTION.

Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

#### REMOVAL OF OTHER SUITS.

Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding

section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State.

#### SEVERABLE CONTROVERSY.

And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

#### REMOVAL FOR LOCAL INFLUENCE.

And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State have the right, on account of such prejudice or local influence, to remove said cause; provided, that if it further appear that said suit can be fully and justly determined as to other defendants in the State court without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein.

#### REMAND OF CASE REMOVED FOR LOCAL INFLUENCE.

At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, upon application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.

#### NO APPEAL FROM REMANDING ORDER.

Whenever any cause shall be removed from any State court into any

circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

#### PROCEEDINGS IN STATE COURT.

**Sec. 3.** That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said company being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.

#### REMOVAL OF SUIT AS TO TITLE UNDER GRANTS FROM DIFFERENT STATES.

And if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, anyone or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act remove the cause for trial to the circuit court of the United

States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

#### REMOVAL—ATTACHMENTS—INJUNCTIONS.

Sec. 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced.

And all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal.

And all injunctions, orders, and the proceedings had in such court prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

#### LACK OF JURISDICTION—SUIT DISMISSED OR REMANDED TO STATE COURT.

Sec. 5. That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

#### REMOVAL—PRACTICE AFTER.

Sec. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

#### REMOVAL—PRACTICE AS TO.

Sec. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden,



shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days such filing and appearance shall be taken to satisfy the said bond in that behalf.

That if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law.

And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring a prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding.

But if said order shall be complied with, then said circuit court shall require the other party to plead, and said action, or proceeding, shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditional as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

#### SUIT TO ENFORCE POSSESSION, ETC.—SERVICE BY PUBLICATION.

Sec. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or de-

fendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be.

Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks.

And in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon the proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district.

But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.

And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State, provided, however, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

#### DEATH OF PARTY—SUBSTITUTION OF REPRESENTATIVE.

Sec. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid.

The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error, as the party he represents might have done.

If the party in whose favor such judgment or decree is rendered has died before an appeal taken or writ of error brought, notice to his representative shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

#### REPEAL.

Sec. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

## FURTHER AMENDMENT TO ACT 1875.

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An Act Approved August 13, 1888, to Amend Sections 1, 2, 3, and 10 of an Act to Determine the Jurisdiction of the Circuit Courts, etc. 25 Stat. at Large, p. 436.

### RECEIVER SHALL MANAGE PROPERTY ACCORDING TO LOCAL LAW.

Sec. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

### RECEIVER MAY BE SUED WITHOUT LEAVE—COURT APPOINTING RECEIVER TO RETAIN CONTROL.

Sec. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

### SUITS BY OR AGAINST NATIONAL BANKS.

Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and in all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

## JURISDICTION SAVED.

Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of Congress of which this act is an amendment, or in the act of Congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

## REPEAL.

Sec. 6. That the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed; provided, that this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

## RELATIVE OF JUDGE NOT TO BE EMPLOYED IN COURT.

Sec. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

RULES OF PRACTICE  
FOR THE  
COURTS OF EQUITY OF THE UNITED STATES.

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RULE I.

*Court always open.*—The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

RULE II.

*Rule day.*—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

RULE III.

*Orders at chambers.*—Any judge of the circuit court, as well in vacation as in term, may at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party or his solicitor to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

RULE IV.

*Order book—entry of motions.*—All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book to be kept at the clerk's office, on the day when they are made

and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

## RULE V.

*Motions grantable by clerk.*—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded, by any judge of the court, upon special cause shown.

## RULE VI.

*Motions not of course.*—All motions for rules or orders or other proceedings which are not grantable of course or without notice shall, under a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

## RULE VII.

*Mesne process.*—The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the pur-

pose of compelling obedience to any interlocutory or final order or decree of the court.

## RULE VIII.

*Final process.*—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

## RULE IX.

*Writ of assistance.*—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

## RULE X.

*Persons not parties.*—Every person, not being a party in an cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

## RULE XI.

*Issuance of subpœna.*—No process or subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

## RULE XII.

*Return of subpœna.*—Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the

plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

## RULE XIII.

*Manner of service of subpoena.*—The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

## RULE XIV.

*Alias subpoena.*—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties*, against each defendant, if he shall require it, until due service is made.

## RULE XV.

*By whom served.*—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

## RULE XVI.

*Docketing cause.*—Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

## RULE XVII.

*Appearance, when and how entered.*—The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.



## RULE XVIII.

*Default and decree pro confesso.*—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

## RULE XIX.

*Decree pro confesso—default set aside.*—When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso* and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

## RULE XX.

*Bill, form of.*—Every bill, in the introductory part thereof, shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of — and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

## RULE XXI.

*Clauses omitted from bill.*—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law, and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or starting part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, is shall be specially asked for.

## RULE XXII.

*Parties beyond jurisdiction.*—If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without jurisdiction of the court, or that they can not be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

## RULE XXIII.

*Prayer for process.*—The prayer for process of subpoena in the bill shall contain the names of the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact so that the court may take order thereon, as justice may require, upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

## RULE XXIV.

*Counsel must sign bill.*—Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed.

## RULE XXV.

*Costs—purposes of taxation.*—In order to prevent unnecessary costs and expenses and, to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs of every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

## RULE XXVI.

*Contents of bill—exceptions.*—Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments *in hæc verba* or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

## RULE XXVII.

*Exceptions for scandal or impertinence.*—No order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process of the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report on the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

## RULE XXVIII.

*Bills amended—costs paid and copy furnished.*—The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, as he may do of course, after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall

pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the place where the same are to be inserted. And if the amendments are numerous he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

## RULE XXIX.

*Amendment of bill.*—After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

## RULE XXX.

*Abandonment and proceeding thereon.*—If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

## RULE XXXI.

*Certificate of counsel—affidavit.*—No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

## RULE XXXII.

*Defendant may demur, plead, or answer.*—The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part and answer to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea

and explicitly denying the fraud and combination, and the facts on which the charge is founded.

## RULE XXXIII.

*Setting down for argument.*—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

## RULE XXXIV.

*Proceedings on overruling demurrer or plea.*—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

## RULE XXXV.

*If sustained—amendment of bill.*—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

## RULE XXXVI.

*Extent of demurrer or plea.*—No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

## RULE XXXVII.

*Answer as affecting demurrer or plea.*—No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

## RULE XXXVIII.

*Failure to reply or to set down for argument.*—If the plaintiff shall

not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course unless a judge of the court shall allow him further time for the purpose.

#### RULE XL.

*Answer.*—The rule that if a defendant submits to answer he shall answer or discovery of his title than he would be in any answer in support where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matter of defense (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters that he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection and shall not be compellable to make any further answer fully to all the matters of the bill shall no longer apply in cases of such plea.

#### RULE XLI.

*Interrogatories.*—It shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

#### RULE XXXIX.

*Interrogatories continued.*—(1) The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

(2) If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for

hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

## RULE XLII.

*Note specifying interrogatories to be answered, part of bill.*—The note at the foot of the bill specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

## RULE XLIII.

*Form when interrogatories are used.*—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words: "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth by the note hereunder written they are respectively required to answer; that is to say:

"1. Whether, etc.

"2. Whether," etc.

## RULE XLIV.

*When interrogatories need not be answered.*—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

## RULE XLV.

*Special replication not allowed.*—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in his discretion direct.

## RULE XLVI.

*Answer to amended bill.*—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

## RULE XLVII.

*Omission of parties.*—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

## RULE XLVIII.

*Parties, when numerous.*—Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

## RULE XLIX.

*Suits by trustees.*—In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

## RULE L.

*Heir, when party and when not.*—In suits to execute the trusts of a



will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

## RULE LI.

*Joint and several demands.*—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

## RULE LII.

*Defect of parties.*—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

## RULE LIII.

*Objection of defect of parties.*—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

## RULE LIV.

*Nominal parties.*—Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

## RULE LV.

*Injunctions.*—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

## RULE LVI

*Revivor of suit.*—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time, and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk requiring the proper of representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

## RULE LVII.

*Supplemental bill.*—Whenever a suit in equity shall become defective from any event happening after the filing of the bill, as, for example, by change of interest in the parties, or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

## RULE LVIII.

*Bills of revivor or supplement.*—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

## RULE LIX.

*Answer verified before whom.*—Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or notary public.

## RULE LX.

*Amendment of answer.*—After an answer is put in it may be amended as of course in any matter of form or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for hearing it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

## RULE LXI.

*Exceptions for insufficiency.*—After an answer is filed on any rule day the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

## RULE LXII.

*Costs of separate answers.*—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

## RULE LXIII.

*Setting down exceptions for argument.*—Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these

rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

## RULE LXIV.

*If exceptions sustained, further answer.*—If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such a writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

## RULE LXV.

*Costs on exception.*—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

## RULE LXVI.

*Replication.*—Whenever the answer of the defendant shall not be accepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

## RULE LXVII.

*Testimony—how taken.*—(1) After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court or by a judge thereof. Ordered, that the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

(2) Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court or before an examiner to be specially appointed by the court, the examiner, if he so request, shall be furnished with a copy of the pleadings; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common law courts. The depositions taken upon such oral examinations shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into type-writing or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

#### RULE LXVIII.

*Under acts of Congress.*—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

#### RULE LXIX.

*Time for testimony.*—Three months, and no more, shall be allowed for

the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books, or indorsed upon the deposition or testimony.

## RULE LXX.

*Infirm, single or about to depart.*—After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.

## RULE LXXI.

*Last interrogatory.*—The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

## RULE LXXII.

*Cross-bill—answer to.*—Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

## RULE LXXIII.

*Account of estate.*—Every decree for an account of the personal estate

of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

RULE LXXIV.

*Proceedings on reference.*—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference was made shall cause the same to be presented to the master for hearing on or before the next rule day succeeding the time when the reference is made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE LXXV.

*Master, proceedings before.*—Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

RULE LXXVI.

*Master's report.*—In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited. But such state of facts, charges, affidavits, deposition, examination or answer shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition or answer were so brought in or used.

RULE LXXVII.

*Duty and power of master.*—The master shall regulate all the proceedings in every hearing before him upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the pro-



duction of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

## RULE LXXVIII.

*Attendance of witnesses.*—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

## RULE LXXIX.

*Form of accounts.*—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

## RULE LXXX.

*What used before master.*—All affidavits, depositions and documents which have been previously made, read or used in the court, upon any proceeding in any cause or matter, may be used before the master.

## RULE LXXXI.

*Who may be examined.*—The master shall be at liberty to examine any

creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

RULE LXXXII.

*Appointment—fees.*—The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

RULE LXXXIII.

*Return and entry of master's report.*—The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto, and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed they shall stand for hearing before the court if the court is then in session, or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

RULE LXXXIV.

*Costs on frivolous causes.*—And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the circuit court.

RULE LXXXV.

*Correction of decrees.*—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time

before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

## RULE LXXXVI.

*Decree, form of.*—In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, *viz.*." (Here insert the decree or order.)

## RULE LXXXVII.

*Suits by or against incompetents*—Guardians *ad litem* to defend a suit, may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for them.

## RULE LXXXVIII.

*Rehearing.*—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court.

## RULE LXXXIX.

*Rules by circuit court.*—The circuit courts (a majority of all the judges thereof, including the justice of the supreme court, the circuit judges and the district judge for the district concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

## RULE XC.

*Rules of practice.*—In all cases where the rules prescribed by this court

or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

RULE XCI.

*Affirmation.*—Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

RULE XCII.

*Decree in foreclosure cases.*—In suits in equity for the foreclosure of mortgages in the circuit court of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

RULE XCIII.

*Injunction—on appeal.*—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

RULE XCIV.

*Bill by stockholder.*—Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders and the causes of his failure to obtain such action.

## RULES FOR PRACTICE AND PROCEDURE IN COPYRIGHT CASES.

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### 1.

The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the act of March 4th, 1909, entitled "An act to amend and consolidate the acts respecting copyright."

### 2.

A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works, and in any case where it is not feasible.

### 3.

Upon the institution of any action, suit, or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under sec. 34 of the act of March 4th, 1909, an affidavit stating upon the best of his knowledge, information, and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court, or a commissioner thereof.

### 4.

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceedings; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the

filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same, subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

## 5.

The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond, by delivering the same to him personally, if he can be found within the district, or, if he cannot be found, to his agent, if any, or to the person from whose possession the articles are taken, or, if the owner, agent, or such person cannot be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure, and warning all persons from in any manner interfering therewith.

## 6.

A marshal who has seized alleged infringing articles shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

## 7.

Within three days after the articles are seized, and a copy of the affidavit, writ, and bond are served, as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions, it may order a new bond to be executed by the plaintiff or complainant, or, in default thereof, within a time to be named by the court, the property to be returned to the defendant.

## 8.

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a no-

tice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

## 9.

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

## 10.

Thereupon the court, in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum, to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles, to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

## 11.

Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

## 12.

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

## 13.

For services in cases arising under this section, the marshal shall be entitled to the same fees as are allowed for similar services in other cases.

## STATUTES AFFECTING PRACTICE AND PROCEDURE.

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United States Revised Statutes, sections 917 and 918, gives to the Supreme Court of the United States and the United States circuit courts power to promulgate rules of practice for courts of equity.

United States Revised Statutes, sections 911-912, provides for the manner of issuing process from the courts of the United States, and how tested.

United States Revised Statutes, section 913, refers to forms of mesne process and proceedings in courts of equity.

United States Revised Statutes, section 717, provides for granting writs of ne exeat.

United States Revised Statutes, sections 718 and 719, provide for issuing injunctions as well as the manner and place where granted.

United States Revised Statutes, section 720, prohibits injunctions to stay proceedings in the courts of the State.

United States Revised Statutes, section 723, forbidding suits in equity when there is an adequate remedy at law.

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## LIEN OF DECREE.

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**An Act to regulate the lien of judgments and decrees of the courts of the United States, approved August 1, 1888. 25 Stat. at Large, 357.**

### **LIEN OF JUDGMENT IN FEDERAL COURT—DOCKETING FEDERAL JUDGMENT IN STATE OFFICE.**

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That judgments and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: provided, that, whenever the laws of any State require a judgment or decree of a State court to be registered, recorded,



docketed, indexed or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

CLERK TO KEEP JUDGMENT DOCKET.

Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

JUDGMENT OF FEDERAL COURT NEED NOT BE DOCKETED IN COUNTY WHERE RENDERED.

Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county.

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## APPELLATE COURT ACT OF MARCH 3, 1891.

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An Act to establish the circuit court of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes. Approved March 3, 1891.

ADDITIONAL CIRCUIT JUDGES TO BE APPOINTED.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President of the United States by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

S. Eq.—65.

CIRCUIT COURT OF APPEALS CREATED IN EACH CIRCUIT—ORGANIZATION—  
CLERK—MARSHAL—FEES.

Sec. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the forms of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the Supreme Court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the Supreme Court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal portions quarterly. The costs and fees in the Supreme Court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the Treasury Department of the United States in the same manner as is provided in respect to the costs and fees in the Supreme Court.

## RULES.

The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

## JUDGES WHO MAY HOLD CIRCUIT COURT OF APPEALS.

Sec. 3. That the Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the chief justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

## DISTRICT JUDGE MAY SIT—JUDGE NOT TO REVIEW HIS OWN JUDGMENT.

In case the full report shall not at any time be made up by the

attendance of the Chief Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court; provided, that no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals.

**APPELLATE JURISDICTION OF CIRCUIT COURTS ABOLISHED—JUDGMENTS OF CIRCUIT AND DISTRICT COURTS TO BE REVISED ONLY BY THE UNITED STATES SUPREME COURT OR BY CIRCUIT COURTS OF APPEALS.**

Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts; but all appeals by writ of error [or] otherwise, from said district courts, shall only be subject to review in the Supreme Court of the United States, or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts, shall be had only in the Supreme Court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same.

**DIRECT APPEAL FROM TRIAL COURT TO SUPREME COURT—WHEN ALLOWED.**

Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts, direct to the Supreme Court, in the following cases:

1. In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

2. From the final sentences and decrees in prize causes.

3. In cases of conviction of a capital or otherwise infamous crime.

4. In any case that involves the construction or application of the Constitution of the United States.

5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

6. In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

**THIS STATUTE NOT TO AFFECT APPEALS FROM THE HIGHEST COURT OF A STATE TO THE SUPREME COURT.**

Nothing in this act shall affect the jurisdiction of the Supreme Court in

cases appealed from the highest court of a State, nor the construction of the statute providing for a review of such cases.

**JURISDICTION OF CIRCUIT COURTS OF APPEALS—WHEN FINAL.**

Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision [s] in the district court [s] and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens or citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws and under the criminal laws and in admiralty cases.

**REVISION OF JUDGMENT OF CIRCUIT COURT OF APPEALS BY SUPREME COURT.**

Excepting that, in every such subject within its appellate jurisdiction, the circuit court of appeals, at any time, may certify to the Supreme Court of the United States, any questions or propositions of law, concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case; or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy, in the same manner as if it had been brought there for review, by writ of error or appeal.

And excepting also, that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final, there shall be of right an appeal, or writ of error, or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs. But no such appeal shall be taken, or writ of error sued out, unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

**APPEAL TO CIRCUIT COURT OF APPEALS FROM INTERLOCUTORY DECREE GRANTING OR CONTINUING AN INJUNCTION.**

Sec. 7. That where, upon a hearing in equity in a district court or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court

of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals; provided, that the appeals must be taken within thirty days from the entry of such order or decree; and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

CASES REVIEWED BY THE SUPREME COURT OR BY A CIRCUIT COURT OF APPEALS  
TO BE REMANDED TO THE PROPER CIRCUIT OR DISTRICT COURT.

Sec. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ or [of] error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final, such cause shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination.

APPEAL TO CIRCUIT COURT OF APPEALS TO BE TAKEN WITHIN SIX MONTHS  
OR LESS.

Sec. 11. That no appeal or writ of error, by which any order, judgment, or decree may be reviewed in the circuit courts of appeals, under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment, or decree sought to be reviewed; provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to, or sued out from, the circuit courts of appeals.

PRACTICE AS TO APPEALS.

And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act, in respect of the circuit courts of appeals, including all provisions for bonds, or other securities, to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same

powers and duties, as to the allowance of appeals or writs of error, and the condition of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

#### POWER OF CIRCUIT COURT OF APPEALS TO ISSUE WRITS.

Sec. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

Section 716 of the Revised Statutes is as follows: The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

#### REPEAL.

Sec. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

Section 691 of the Revised Statutes, repealed by this section provided for a writ of error from the United States Supreme Court to circuit courts to review their final judgments when the matter in dispute exceeded \$2,000.

Section 3 of the act of February 16, 1875, repealed by this section, provided that, in order that judgments and decree of circuit courts might be reviewed by the Supreme Court, the value in dispute must be \$5000 where before it had been \$2000. The unrepealed part of the act of February 16, 1875, is printed in full *post*.

#### APPEAL FROM SUPREME COURT OF TERRITORY TO CIRCUIT COURT OF APPEALS.

Sec. 15. That the circuit court of appeals in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

Approved March 3, 1891.

See 175 U. S., 684, and 142 U. S., 459.

## RULES OF PRACTICE IN THE CIRCUIT COURT OF APPEALS.

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While rules were originally adopted by the Supreme Court governing the practice and procedure in the United States circuit court of appeals, yet many of these rules have been amended in the different circuits, as to the judges seemed necessary to advance and expedite justice; so I will not undertake to print these rules, but will refer the student to the 90th Federal Reporter, from page v to clxx, where the original act creating these courts and amendments thereto are fully set forth; also the original rules promulgated by the Supreme Court to govern the practice and the various amendments to these rules that have been made in the nine circuits, accompanied with full annotations.

Section 699 of the United States Revised Statutes provides for appeals in special cases, without reference to amount in dispute, and the following sections of the United States Revised Statutes, governing procedure in error and on appeal, are still in force, to wit: Sections 997, 998, 999, 1000, 1003, 1004, 1005, 1007, 1008, 1010.

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## UNITED STATES SUPREME COURT RULES.

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### RULE 5.—PROCESS, HOW ISSUED AND SERVED.

1. All process of this court shall be in the name of the President of the United States.

2. When process at common law or in equity shall issue against a State, the same shall be served on the governor or chief executive magistrate and attorney general of such State.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return day of said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

### RULE 6.—MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly postpaid, at such time as to reach him by due course of mail three weeks or thirty days before the time fixed by the notice, will be regarded as prima facie evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

#### RULE 8.—WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the court to the jury.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such



rule or order for the safe keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

#### RULE 11.—DOCUMENT IN FOREIGN LANGUAGE.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

#### RULE 12.—DEPOSITIONS IN SUPREME COURT.

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice; provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

#### RULE 13.—OBJECTIONS TO EVIDENCE IN RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility

of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

**RULE 14.—DIMINUTION OF RECORD.**

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

**RULE 15.—DEATH OF PARTY.**

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous; provided, however, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the Supreme Court of the United States from any final judgment or decree rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit can not be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded

or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative and the State or Territory in which such representative resides; and, upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous; provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the Supreme Court then next ensuing; and provided, also, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within time as above required by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

**RULE 16.—NO APPEARANCE OF PLAINTIFF.**

Where no counsel appears and no brief has been filed by the plaintiff in error, or appellant, when the case is called for trial the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record or pray for an affirmance.

**RULE 17.—NO APPEARANCE OF DEFENDANT.**

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

**RULE 18.—NO APPEARANCE OF EITHER PARTY.**

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

## RULE 19.—NEITHER PARTY READY AT SECOND TERM.

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

## RULE 20.—PRINTED ARGUMENTS.

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this court must be first filed.

2. When a case is reached in a regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

## RULE 21.—BRIEFS.

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *toidem verbis* whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the

specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, 'at least three days before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error of appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

(See Rule 31 as to form and size.)

#### RULE 22.—ORAL ARGUMENTS.

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

#### RULE 23.—DISMISSING CASES IN VACATION.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk

any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

**RULE 29.—SUPERSEDEAS.**

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to affect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay and costs and interest on the appeal.

**RULE 30.—REHEARING.**

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

**RULE 31.—FORM OF PRINTED RECORDS AND BRIEFS.**

All records, arguments, and briefs for the use of the court must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume, and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica), and on unglazed paper.

178 U. S. 618, 179 U. S. 294.

**RULE 32.—WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, OR UNDER SECTION 5 OF THE ACT OF MARCH 3, 1891, CHAPTER 517.**

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under section 5 of the act of March 3, 1891, chapter 517, where the only question in issue is the question of

the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by rule 6, in regard to motions to dismiss writs of error and appeals. 194 U. S. 194.

**RULE 35.—ASSIGNMENT OF ERRORS.**

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed according to the provisions of sections 2, 3, 4, 5, 6 and 9 of rule 10.

**RULE 36.—APPEALS AND WRITS OF ERROR.**

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in another criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

**RULE 37.—CASES FROM CIRCUIT COURT OF APPEALS.**

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

**RULE 39.—MANDATES.**

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.



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